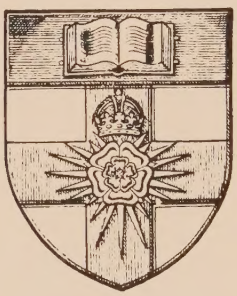
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

346.4



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1908_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir C. M. Warmington, Bart., K.C.
Vice-Chairman—Sir F. A. Bosanquet, K.C.

EX-OFFICIO MEMBERS.

Sir William S. Robson, M.P. . . Attorney-General.
Sir Samuel T. Evans, M.P. . . Solicitor-General.
James S. Beale, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. J. Eldon Bankes, Esq., K.C.	Inner Temple.
Sir C. M. Warmington, Bart., K.C. C. C. Scott, Esq.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams (Firm — Messrs. Hollams, Sons, Coward & Hawksley). W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1908.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. COWELL DAVIES, H. B. HEMMING,	*Barristers-at-Law.*
Mr. Justice Joyce AND Mr. Justice Eve	G. A. STREETEN, R. MORRISON, GEORGE MACAN,	*Barristers-at-Law.*
Mr. Justice Swinfen Eady AND Mr. Justice Neville	H. L. FRASER, G. R. ALSTON, J. R. BROOKE,	*Barristers-at-Law.*
Mr. Justice Warrington AND Mr. Justice Parker	FRANK EVANS, H. C. ROPER, W. IVIMEY COOK,	*Barristers-at-Law.*

1908.—VOL. II.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

Lord Loreburn	*Lord Chancellor.*
Lord Alverstone	*Lord Chief Justice of England.*
Sir H. H. Cozens-Hardy	*Master of the Rolls.*
Sir John Gorell Barnes	*President of the Probate, Divorce, and Admiralty Division.*
Sir Roland Vaughan Williams Sir J. Fletcher Moulton Sir George Farwell Sir H. B. Buckley Sir W. R. Kennedy	*Lords Justices of the Court of Appeal.*
Sir Matthew I. Joyce Sir C. Swinfen Eady Sir T. Rolls Warrington Sir R. Neville Sir R. J. Parker Sir H. T. Eve	*Justices of High Court, attached to Chancery Division.*
Sir William S. Robson	*Attorney-General.*
Sir Samuel T. Evans	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
69 71 73	8 of headnote 18, 26 and 29 17	*In re* Ackerman	*In re* Akerman
124	11 and 12	should read *Haldane, K.C., P. O. Lawrence, K.C.*, and *George Lawrence*, for the appellants; *Upjohn, K.C., E. P. Hewitt* and *W. A. Jolly*, for the respondent.	

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1908, will be as follows :—

In the First Series,
[1908] 1 Ch. [1908] 2 Ch.

In the Second Series,
[1908] 1 K. B. [1908] 2 K. B. [1908] P.

In the Third Series,
[1908] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abrahams, *In re.* Abrahams *v.* Abrahams – – – –	69
——— *v.* Abrahams. *In re* Abrahams – – – –	69
Adjustable Cover and Boiler Block Company, Poulton *v.* (C.A.)	430
Aerated Bread Company's Application, *In re. In re* Albert Baker & Co.'s Application –	86
Albert Baker & Co.'s Application, *In re. In re* Aerated Bread Company's Application–	86
Anderson *v.* Wandsworth Borough Council – – – –	81
Anstis' and McLean's Claims. *In re* National Motor Mail-coach Company – –	228
Atkinson, *In re.* Proctor *v.* Atkinson – – (C.A.)	307
———, Proctor *v. In re* Atkinson – – (C.A.)	307
Attorney-General *v.* Birmingham, Tame, and Rea District Drainage Board – – – –	551

B.

	PAGE
Baker (Albert) & Co.'s Application, *In re. In re* Aerated Bread Company's Application–	86
Baldwin *v.* Pescott. *In re* Jacobs – – – –	691
Barker *v.* Illingworth – –	20
Barraclough *v.* Cooper	H.L. (E.) 121, n.

PAGE

Beckett *v.* Grimthorpe (Lord). *In re* Grimthorpe (Lord) (C.A.) 675
Belli *v.* Lane. *In re* Lane – 581
Berkhamsted Grammar School, *In re*– – – – – 25
Bevan, Burton *v.* – – – 240
Birmingham, Tame, and Rea District Drainage Board, Attorney-General *v.* – – – – 551
Booth, Burgess *v.* – (C.A.) 648
Bowerman, *In re.* Porter *v.* Bowerman – – – – 340
———, Porter *v.* *In re* Bowerman – – – – 340
Brewster, *In re.* Butler *v.* Southam – – – – 365
British Building Stone Company, *In re* – – – – 450
Bruce, *In re.* Lawford *v.* Bruce (C.A.) 682
———, Lawford *v.* *In re* Bruce (C.A.) 682
Burgess *v.* Booth – (C.A.) 648
Burke, *In re.* Burke *v.* Burke – 248
——— *v.* Burke. *In re* Burke – 248
Burton *v.* Bevan – – – 240
Butler *v.* Southam. *In re* Brewster – – – – – 365
Butterley Company *v.* New Hucknall Colliery Company – – 475

C.

Calgary and Medicine Hat Land Company, *In re.* Pigeon *v.* The Company – (C.A.) 652
———, Pigeon *v.* *In re* The Company – (C.A.) 652
Carshalton Park Estate, Ld., *In re.* Graham *v.* The Company. Turnell *v.* The Company – – – – 62
Chapman *v.* Michaelson – – 612
Chester *v.* Henson. *In re* Henson – – – – – 356
Chesterfield (Lord) *v.* Harris (C.A.) 397
Clinton's Claim. *In re* National Motor Mail-coach Company (C.A.) 515

PAGE

Cooper, Barraclough *v.* H.L. (E.) 121, n.
Cope, *In re.* Cross *v.* Cross (C.A.) 1
——— *v.* Crossingham – – 624
Copestake *v.* Hoper – (C.A.) 10
Corns *v.* Harrison. *In re* Lambert – – – – – 117
Cross *v.* Cross. *In re* Cope (C.A.) 1
Crossingham, Cope *v.* – – 624
Croydon Corporation *v.* Croydon Rural Council – (C.A.) 321
——— Rural Council, Croydon Corporation *v.* – (C.A.) 321
Cuffe, *In re.* Fooks *v.* Cuffe – 500
———, Fooks *v.* *In re* Cuffe – 500
Cunard Steamship Company *v.* Hopwood – – – – 564

D.

Dansk Rekylriffel Syndikat Aktieselskab *v.* Snell – – 127
Davis, Weymouth *v.* – – 169
"Diabolo" Trade Mark, *In re.* Philippart *v.* William Whiteley, Ld. – – – – – 274
Dodson, *In re.* Yates *v.* Morton 638

E.

Elementary Education Acts, 1870 and 1873, *In re* – – – 503
Elliston *v.* Reacher – – – 374
——— *v.* ——— – – (C.A.) 665

F.

Farquhar *v.* Newbery Rural Council – – – – 586
Fitzhardinge (Lord) *v.* Purcell – 139
Fooks *v.* Cuffe. *In re* Cuffe – 500
Furness, Withy & Co., Ld. *v.* Pickering – – – – 224

G.

Gill, Maddison *v.* *In re* Sharp (C.A.) 190

PAGE

Graham *v.* Carshalton Park Estate, Ld. *In re* Carshalton Park Estate, Ld. – – – 62
Great Western Railway Company *v.* Midland Railway Company 455
———— *v.* ————
(C.A.) 644
Grimthorpe (Lord), *In re.* Beckett *v.* Grimthorpe (Lord) (C.A.) 675
————, Beckett *v.* *In re* Grimthorpe (Lord) (C.A.) 675

H.

Harper, Wilson *v.* – – – 370
Harrington, *In re.* Wilder *v.* Turner – – – – 687
Harris, Chesterfield (Lord) *v.* (C.A.) 397
Harrison, Corns *v.* *In re* Lambert – – – – – 117
Henson, *In re.* Chester *v.* Henson – – – – – 356
———, Chester *v.* *In re* Henson – – – – – 356
Herring, *In re.* Murray *v.* Herring – – – – – 493
———, Murray *v.* *In re* Herring – – – – – 493
Holland, Sarpy *v.* – (C.A.) 198
Hoper, Copestake *v.* (C.A.) 10
Hopwood, Cunard Steamship Company *v.* – – – 564

I.

Illingworth, Barker *v.* – – 20

J.

Jacobs, *In re.* Baldwin *v.* Pescott – – – – – 691
Jameson, *In re.* King *v.* Winn– 111
Jewish Colonial Trust (Juedische Colonial Bank), Ld., *In re* – 287
Johnson's Patent, *In re* – – 487
Joseph, *In re.* Pain *v.* Joseph (C.A.) 507

PAGE

Joseph, Pain *v.* *In re* Joseph (C.A.) 507

K.

King *v.* Winn. *In re* Jameson – 111

L.

Lambert, *In re.* Corns *v.* Harrison – – – – – 117
Lane, *In re.* Belli *v.* Lane – 581
——, Belli *v.* *In re* Lane – 581
Lawford *v.* Bruce. *In re* Bruce (C.A.) 682
Lecouturier, Rey *v.*– (C.A.) 715
Liverpool and North Wales Steamship Company *v.* Mersey Trading Company – – 460
London County Council, Price's Patent Candle Company *v.* (C.A.) 526

M.

Macintosh - Walker *v.* Walker. *In re* Walker – – – 705
McLaughlin, Stewart *v.* *In re* Stewart – – – – 251
Maddison *v.* Gill. *In re* Sharp (C.A.) 190
Mansell *v.* Valley Printing Company – – – (C.A.) 441
Mersey Trading Company, Liverpool and North Wales Steamship Company *v.* – – – 460
Metropolitan Water Board *v.* Solomon – – – – 214
Michaelson, Chapman *v.* – – 612
Midland Railway Company, Great Western Railway Company *v.* 455
———— *v.* ————
(C.A.) 644
Morton, Yates *v.* *In re* Dodson 638
Moses, *In re.* Moses *v.* Valentine 235
—— *v.* Valentine. *In re* Moses 235
Murray *v.* Herring. *In re* Herring – – – – – 493

N.

PAGE

National Motor Mail-coach Company, *In re*. Anstis' and McLean's Claims – – 228

——————— Clinton's Claim – – (C.A.) 515

National Starch Company's Application, *In re* – – – 698

National Telephone Company, Postmaster-General *v.* (C.A.) 172

———————, South Eastern Railway Company *v.* – – – – 50

———————, ——————— *v.* – – (C.A.) 514

New Hucknall Colliery Company, Butterley Company *v.* – – 475

Newbery Rural Council, Farquhar *v.* – – – – 586

O.

Oliver, *In re*. Wilson *v.* Oliver– 74

———, Wilson *v.* *In re* Oliver– 74

P.

Pain *v.* Joseph. *In re* Joseph (C.A.) 507

Pescott, Baldwin *v.* *In re* Jacobs 691

Philippart *v.* William Whiteley, Ld. *In re* Philippart's Trade Mark "Diabolo" – – 274

Pickering, Furness, Withy & Co., Ld. *v.* – – – – 224

Pigeon *v.* Calgary and Medicine Hat Land Company. *In re* The Company – (C.A.) 652

Porter *v.* Bowerman. *In re* Bowerman – – – – 340

Postmaster-General *v.* National Telephone Company (C.A.) 172

Poulton *v.* Adjustable Cover and Boiler Block Company (C.A.) 430

Price's Patent Candle Company *v.* London County Council (C.A.) 526

PAGE

Proctor *v.* Atkinson. *In re* Atkinson – – (C.A.) 307

Purcell, Fitzhardinge (Lord) *v.* – 139

R.

Reacher, Elliston *v.* – – 374

———, ——— *v.* (C.A.) 665

Rey *v.* Lecouturier (C.A.) 715

S.

St. George, Hanover Square (Rector and Churchwardens), Westminster Corporation *v.* – 600

Sarpy *v.* Holland – (C.A.) 198

Sharp, *In re*. Maddison *v.* Gill (C.A.) 190

Snell, Dansk Rekylriffel Syndikat Aktieselskab *v.* – – – 127

Solomon, Metropolitan Water Board *v.* – – – – 214

South Eastern Railway Company *v.* National Telephone Company – – – – – 50

———————, ——————— *v.* ——————— – – – (C.A.) 514

Southam, Butler *v.* *In re* Brewster – – – – – 365

Stewart, *In re*. Stewart *v.* McLaughlin – – – 251

——— *v.* McLaughlin. *In re* Stewart – – – – 251

Stirling, *In re*. Stirling *v.* Stirling – – – – – 344

——— *v.* Stirling. *In re* Stirling – – – – – 344

Summers, White *v.* – – – 256

T.

Turnell *v.* Carshalton Park Estate, Ld. *In re* Carshalton Park Estate, Ld. – – – 62

Turner, Wilder *v.* *In re* Harrington – – – – 687

V.

PAGE

Valentine, Moses *v.* *In re* Moses 235
Valley Printing Company, Mansell *v.* – – (C.A.) 441

W.

Walker, *In re.* Macintosh-Walker *v.* Walker – – 705
———, Macintosh-Walker *v.* *In re* Walker – – – 705
Wandsworth Borough Council, Anderson *v.* – – 81
Westminster Corporation *v.* St. George, Hanover Square (Rector and Churchwardens) – 600
Weymouth *v.* Davis – – 169
White *v.* Summers – – – 256
Wilder *v.* Turner. *In re* Harrington – – – – 687
William Whiteley, Ld., Philippart *v.* *In re* Philippart's Trade Mark "Diabolo" – 274
Wilson *v.* Harper – – – 370
——— *v.* Oliver. *In re* Oliver– 74
Winn, King *v.* *In re* Jameson– 111

Y.

Yates *v.* Morton. *In re* Dodson 638

TABLE OF CASES CITED.

A.

		PAGE
Abernethy *v.* Hutchinson	1 H. & T. 28	442
Ackroyd *v.* Smith	10 C. B. 164	427
Akerman, In re	[1891] 3 Ch. 212	69
Alcock *v.* Cooke	5 Bing. 340	469
Alexander *v.* Alexander	16 C. B. 59	261
Alton Woods (Case of)	1 Rep. 40 b.	469
Ambrose *v.* Kerrison	10 C. B. 776	518
Anon.	1 Camp. 517, n.	143
Anthony, In re	[1892] 1 Ch. 450	341
"Apollinaris" Trade Mark, In re	[1907] 2 Ch. 178	278
Applebee, In re	[1891] 3 Ch. 422	252
Arnold *v.* Dixon	L. R. 19 Eq. 113	639
Ashley *v.* Ashley	6 Sim. 358	258
Askew *v.* Woodhead	14 Ch. D. 27	695
Attorney-General *v.* Antrobus	[1905] 2 Ch. 188	588
——— *v.* Birmingham Corporation	4 K. & J. 528	532
——— *v.* Burridge	10 Price, 350	471
——— *v.* Christ's Hospital (Governors)	[1896] 1 Ch. 879	34
——— *v.* Cockermouth Local Board	L. R. 18 Eq. 172	554
——— *v.* Drapers' Company	4 Drew. 299	605
——— *v.* Eastlake	11 Hare, 205	606
——— *v.* Edison Telephone Company of London	6 Q. B. D. 244	174
——— *v.* Emerson	[1891] A. C. 649	141
——— *v.* Freeman	5 Price, 425	606
——— *v.* Hackney Local Board	L. R. 20 Eq. 626	532
——— *v.* Hubbuck	13 Q. B. D. 275	675
——— *v.* Metropolitan Board of Works	9 L. T. 139; 27 J. P. 597	532
——— *v.* Parmeter	10 Price, 378	470
——— *v.* Simpson	[1901] 2 Ch. 671	404
——— *v.* Smith	Stuart Moore, History and Laws of the Foreshore, 3rd ed. pp. 402, 403	141
——— *v.* Worcester (Bishop)	9 Hare, 328	38
——— *v.* Wright	[1897] 2 Q. B. 318	470
Attwell *v.* Attwell	L. R. 13 Eq. 23	711

		PAGE
Australian Wine Importers, Ld., In re	41 Ch. D. 278	101, 701
Ayr Harbour Trustees *v.* Oswald	8 App. Cas. 623	217

B.

Bagot Pneumatic Tyre Company *v.* Clipper Pneumatic Tyre Company	[1902] 1 Ch. 146	127
Bailey *v.* Stephens	12 C. B. (N.S.) 91	400
Baily *v.* De Crespigny	L. R. 4 Q. B. 180	216
Ball's Patent, In re	4 App. Cas. 171	489
Banks and James' Trade Marks, In re	12 Rep. Pat. Cas. 333	98
Barker *v.* Richardson	4 B. & Al. 579	588
Barraclough *v.* Cooper	[1908] 2 Ch. 121, n.	3, 117
Barrett *v.* Gilmour & Co.	6 Com. Cas. 72	372
Bateman *v.* Poplar District Board of Works (No. 2)	37 Ch. D. 272	539
Bater *v.* Bater	[1906] P. 209	349
Batt & Co.'s Trade Marks, In re	[1898] 2 Ch. 432; 15 Rep. Pat. Cas. 262, 534	286
Batten *v.* Gedye	41 Ch. D. 507	587
Battersea Vestry *v.* County of London and British Provincial Electric Lighting Company	[1899] 1 Ch. 474	56
Baxter *v.* Taylor	4 B. & Ad. 72	588
Beardmore *v.* Gregory	2 H. & M. 491	64
Bellairs *v.* Bellairs	L. R. 18 Eq. 510	74
Belshaw *v.* Bush	11 C. B. 191	231
Bence, In re	[1891] 3 Ch. 242	261
Berkhampstead School Case	L. R. 1 Eq. 102	27
Bernicia Steamship, Ld., In re	[1900] W. N. 24	292
Berry *v.* Banner	Peake, 212	605
Bilbee *v.* Hasse & Co.	5 Times L. R. 677; affirmed C. A., *Times* Newspaper, January 16, 1890	371
Bird *v.* Eggleton	29 Ch. D. 1012	217
Birmingham and District Land Company and Allday, In re	[1893] 1 Ch. 342	381
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	225
Birmingham Small Arms Company's Application, In re	[1907] 2 Ch. 396; 24 Rep. Pat. Cas. 563	98
Birmingham Small Arms Company *v.* Webb & Co.	24 Rep. Pat. Cas. 27	99
Bisgood *v.* Henderson's Transvaal Estates, Ld.	[1908] 1 Ch. 743	293
Blake *v.* Gale	32 Ch. D. 571	683
Blewett *v.* Tregonning	3 Ad. & E. 554	144
Blount *v.* Layard	[1891] 2 Ch. 681, n.	142, 404
Blundell *v.* Catterall	5 B. & Al. 268	143, 540
Boden, In re	[1907] 1 Ch. 132	509
Bodman, In re	[1891] 3 Ch. 135	495
Bonham *v.* Newcomb	1 Vern. 232	62
Bonnard *v.* Dott	[1906] 1 Ch. 740	615
Bonner *v.* Bonner	13 Ves. 379	509
Bootle-cum-Linacre Overseers, In re	7 Times L. R. 219	324
Boughton *v.* Boughton	1 H. L. C. 406	80
"Bovril" Trade Mark, In re	[1896] 2 Ch. 600	276

		PAGE
Bower *v.* Hartley	1 Q. B. D. 652	225
——— *v.* Marris	Cr. & Ph. 351	656
Brackenbury *v.* Gibbons	2 Ch. D. 417	260
Bradford Corporation *v.* Ferrand	[1902] 2 Ch. 655	448
Bradshaw *v.* Beard	12 C. B. (N.S.) 344	518
Brentwood Brick and Coal Company, In re	4 Ch. D. 562	134
Bridle, In re	4 C. P. D. 336	115
Brinckman *v.* Matley	[1904] 2 Ch. 313	142, 540
Bristol United Breweries, Ld. *v.* Abbot	[1908] 1 Ch. 279	574
British and American Trustee and Finance Corporation *v.* Couper	[1894] A. C. 399	288
British Mutual Investment Company *v.* Smart	L. R. 10 Ch. 567	307
Brocklebank *v.* Thompson	[1903] 2 Ch. 344	587
Brooking *v.* Maudslay, Son & Field	38 Ch. D. 636	616
Brown *v.* Gellatly	L. R. 2 Ch. 751	75
Brymer *v.* Riddell	Bell, "Case of Legitimacy under a Putative Marriage"	350
Burland *v.* Broxburn Oil Company	42 Ch. D. 274	97
——— *v.* Kingston-upon-Hull Local Board	3 B. & S. 271	327
Burroughs, Wellcome & Co.'s Trade Marks, In re	[1904] 1 Ch. 736	276
Burton's Will, In re	[1892] 2 Ch. 38	77
Butler *v.* Archer	Owen's Rep. 152	15
Butterknowle Colliery Company *v.* Bishop Auckland Industrial Co-operative Company	[1906] A. C. 305	475

C.

Cackett *v.* Keswick	[1902] 2 Ch. 456	244
Caird *v.* Sime	12 App. Cas. 326	443
Caistor Union *v.* North Kelsey Overseers	62 L. T. 731	325
Campden Charities, In re	18 Ch. D. 310	38, 606
Canadian Pacific Railway Company *v.* Parke	[1899] A. C. 535	220
Capital and Counties Bank *v.* Rhodes	[1903] 1 Ch. 631	171
Carshore *v.* North Eastern Railway Company	29 Ch. D. 344	225
Carswell *v.* Carswell	8 R. 901	348
Carter, In re	41 W. R. 140	77
Casamajor *v.* Strode	19 Ves. 390, n.	75
Casborne *v.* Scarfe	1 Atk. 603	13
Cator *v.* Lewisham Board of Works	5 B. & S. 115	532
Chamberlain's Wharf, Ld. *v.* Smith	[1900] 2 Ch. 605	627
Champion, In re	[1893] 1 Ch. 101	509
Chang-Yen-Mao *v.* Moreing	120 L. T. Jour. 313	616
Chasemore *v.* Richards	7 H. L. C. 349	448
Chatteris *v.* Young	2 Russ. 183	510
Cheedley *v.* Mellor	1 Sid. 313	400
Chesebrough's Trade Mark "Vaseline," In re	[1902] 2 Ch. 1	276
Chesterfield *v.* Fountaine	[1908] 1 Ch. 243, n.	429
——— (Lord) v. Harris	[1908] 1 Ch. 230	144
Chilton *v.* London Corporation	7 Ch. D. 735	403

		PAGE
Chinnock *v.* Hartley Wintney Rural Council	63 J. P. 327	588
Christophers *v.* Sparke	2 Jac. & W. 223	13
Christopherson *v.* Naylor	1 Mer. 320	125
Chudleigh's Case	1 Rep. 113 b	263
Clark *v.* King	3 T. R. 147	403
Clarke *v.* Clemmans	36 L. J. (Ch.) 171	191
——— *v.* Franklin	4 K. & J. 257	675
Clayton *v.* Corby	5 Q. B. 415	400
Clément & Cie.'s Trade Mark, In re	[1900] 1 Ch. 114	96
Clough *v.* London and North Western Railway Company	L. R. 7 Ex. 26	133
Colburn *v.* Simms	2 Hare, 543	443
Colchester Corporation *v.* Brooke	7 Q. B. 339	473
Collins *v.* Castle	36 Ch. D. 243	380
Collins Company *v.* Brown	3 K. & J. 423	721
Colls *v.* Home and Colonial Stores, Ld.	[1904] A. C. 179	382
Colyer *v.* Finch	5 H. L. C. 905	363
Coope *v.* Cresswell	L. R. 2 Ch. 112; L. R. 2 Eq. 106	307, 309
Cornbrook Brewery Company *v.* Law Debenture Corporation	[1904] 1 Ch. 103	564
Corsellis *v.* London County Council	[1907] 1 Ch. 704	588
Corser *v.* Cartwright	L. R. 7 H. L. 356	356
Costard and Wingfield's Case	2 Leon. 44	401
Cotton *v.* Gillard	44 L. J. (Ch.) 90	720
Courtenay *v.* Williams	3 Hare, 539; 15 L. J. (Ch.) 204	682
Coverdale *v.* Charlton	4 Q. B. D. 104	52
Cowper Essex *v.* Acton Local Board	14 App. Cas. 153	539
Crawshay *v.* Thompson	4 Man. & G. 357	443
Cunard Steamship Co., In re	[1908] W. N. 160	570
Cyclists' Touring Club, In re	[1907] 1 Ch. 269	292

D.

Dalton *v.* Angus	6 App. Cas. 740	144
Darnley (Earl), In re	[1907] 1 Ch. 159	74
Davenport *v.* Coltman	12 Sim. 610	677
Davies' Case	3 Mod. 246	143, 402
Davis *v.* Leicester Corporation	[1894] 2 Ch. 208	380
——— *v.* Treharne	6 App. Cas. 460	480
Davis, Bergendahl & Co.'s Trade Mark, In re	6 Rep. Pat. Cas. 207	278
Day *v.* Peacock	18 C. B. (N.S.) 702	84
Dean *v.* Dean	[1891] 3 Ch. 150	259
De Beers Consolidated Mines, Ld. *v.* Howe	[1906] A. C. 455	722
Delany, In re	[1902] 2 Ch. 642	606
De La Warr (Earl) *v.* Miles	17 Ch. D. 535	402
Deptford Churchwardens *v.* Sketchley	8 Q. B. 394	606
De Thoren *v.* Wall	3 R. (H. L.) 28	351
Devonshire (Duke) *v.* Lodge	7 B. & C. 36	144
——— *v.* Pattinson	20 Q. B. D. 263	404
Dimes *v.* Petley	15 Q. B. 276	461
Dixon *v.* Gayfere	1 De G. & J. 655	134
——— *v.* Metropolitan Board of Works	7 Q. B. D. 418	527
Dobson *v.* Waterman	3 Ves. 308, n.	113

		PAGE
Doe *v.* Baytup	3 Ad. & E. 188	53
—— *v.* Bridges	1 B. & Ad. 847	689
—— *v.* Cole	7 B. & C. 243	13
—— *v.* Dacre	1 Bos. & P. 250; 8 T. R. 112	258
—— *v.* Edwards	5 B. & Ad. 1065	14
—— *v.* Lucraft	8 Bing. 386	273
—— *v.* Morgan	3 T. R. 763	258
—— *v.* Williams	5 Ad. & E. 291.	14
Doherty *v.* Allman	3 App. Cas. 709	382
Donaldsons *v.* Becket	4 Burr. 2408	443
Door *v.* Geary	1 Ves. Sen. 255	113
Dowglass *v.* Kendall	Cro. Jac. 256	400
Duke *v.* Littleboy	49 L. J. (Ch.) 802; 28 W. R. 977	627
Dumble, In re	23 Ch. D. 360	76
Duncan *v.* Lawson	41 Ch. D. 394	238
Durrant *v.* Branksome Urban Council	[1897] 2 Ch. 291	553
Dutton, In re	[1893] W. N. 65	191

E.

Early *v.* Benbow	2 Coll. 342	509
Eastern Counties and Tilbury Junction Railway Company, In re	26 L. T. (O.S.) 176	505
Eastman Photographic Materials Company *v.* Comptroller-General	[1898] A. C. 571	276
Easton & Co. *v.* Nar Valley Drainage Commissioners	8 Times L. R. 649	325
Ecroyd *v.* Coulthard	[1898] 2 Ch. 358	404
Eden *v* Weardale Iron and Coal Company	34 Ch. D. 223	225
Edgar *v.* Special Commissioners for English Fisheries	23 L. T. 732	400
Edgware Highway Board *v.* Harrow District Gas Company	L. R. 10 Q. B. 92	56
Egyptian Delta Land and Investment Company, In re	[1907] W. N. 16	292
Eland *v.* Eland	4 My. & Cr. 420	360
Elliot *v.* Merriman	2 Atk. 41; Barn. Ch. 78; 2 W. & T. L. C., 7th ed. p. 896	363
Ellis *v.* Bridgnorth Corporation	15 C. B. (N.S.) 52	427
English and Colonial Produce Company, In re	[1906] 2 Ch. 435	515
Eno *v.* Dunn	15 App. Cas. 252	97, 701
Evans *v.* Ball	30 W. R. 899	711
Evers *v.* Challis	7 H. L. C. 531	266

F.

Falcke *v.* Scottish Imperial Insurance Company	34 Ch. D. 234	524
Farina *v.* Silverlock	6 D. M. & G. 214	443
Farrow *v.* Wilson	L. R. 4 C. P. 744	371
Faulder & Co.'s Trade Mark, In re	[1902] 1 Ch. 125	96
Fawcet *v.* Lowther	2 Ves. Sen. 300	15
Festing *v.* Allen	12 M. & W. 279	260
Field (J. C. & J.), Ld. *v.* Wagel Syndicate, Ld.	[1900] 1 Ch. 651; 17 Rep. Pat. Cas. 266	276

		PAGE
Fishburn *v.* Hollingshead	[1891] 2 Ch. 371	201
Fitzhardinge (Lord) *v.* Purcell	[1908] 2 Ch. 139	540
Fletcher *v.* Birkenhead Corporation	[1907] 1 K. B. 205	539
Flight *v.* Reed	1 H. & C. 703	616
Flood *v.* Flood	[1902] 1 I. R. 538	113
Forbes *v.* Peacock	1 Ph. 717	356
Ford, In re	[1902] 1 Ch. 218; 2 Ch. 605	501
Formby *v.* Barker	[1903] 2 Ch. 539	380, 668
Fothergill *v.* Rowland	L. R. 17 Eq. 132	616
Foulkes *v.* Quartz Hill Consolidated Gold Mining Company	Cab. & E. 156	133
Fraser, In re	[1904] 1 Ch. 111, 726	509
Freeman *v.* Lomas	9 Hare, 109	683
Freke *v.* Carbery (Lord)	L. R. 16 Eq. 461	235
Fuller *v.* Blackpool Winter Gardens and Pavilion Company	[1895] 2 Q. B. 429	202

G.

Gann *v.* Free Fishers of Whitstable	11 H. L. C. 192	469
Garrard, In re	[1907] 1 Ch. 382	605
Garvey *v.* Hibbert	19 Ves. 125	190
Gateward's Case	6 Rep. 59 b	408
Gee *v.* Pritchard	2 Swans. 402	444
Genery *v.* Fitzgerald	Jac. 468	74
Gentili, In the Goods of	Ir. R. 9 Eq. 541	235
Gestetner's Trade Mark, In re	[1908] 1 Ch. 513	277
Gibson, In re	L. R. 2 Eq. 669	113
——— *v.* Bott	7 Ves. 89	238
Glasgow Pavilion, Ld. *v.* Motherwell	6 F. 116	228
Gledstanes *v.* Sandwich (Earl)	4 Man. & G. 995	469
Goodlad *v.* Burnett	1 K. & J. 341	113
Goodman *v.* Saltash Corporation	7 App. Cas. 633	143, 401
Goodright *v.* Cornish	1 Salk. 226	258
——— *v.* Jones	4 M. & S. 88	258
Goodwin *v.* Ivory Soap Company	17 Rep. Pat. Cas. 689	99
Gorringe *v.* Mahlstedt	[1907] A. C. 225	3, 117
Governments Stock Investment Company, In re	[1891] 1 Ch. 649	292
Grange, In re	[1907] 2 Ch. 20	649
———	[1907] 1 Ch. 313	711
Great Northern Railway Company *v.* East and West India Docks and Birmingham Junction Railway Company	7 Rail. Cas. 356	457
Great Western Railway Company *v.* Bishop	L. R. 7 Q. B. 550	539
Greenwich Board of Works *v.* Maudslay	L. R. 5 Q. B. 397	588
Grezier & Doyle *v.* Autran	13 Rep. Pat. Cas. 1	720
Griffin, In re	[1899] 1 Ch. 408	252
Griffith *v.* Ricketts	7 Hare, 299	677
Guinness & Co's. Trade Mark, In re	5 Rep. Pat. Cas. 316	97

H.

Haigh *v.* West	[1893] 2 Q. B. 19	408
Hainesworth *v.* West Riding of Yorkshire Rivers Board	Unreported	555

		PAGE
Hall, In re	[1907] 1 K. B. 875	616
Hammersmith Railway Company *v.* Brand	L. R. 4 H. L. 171	539
Hammond *v.* St. Pancras Vestry	L. R. 9 C. P. 316	539
Hanbury *v.* Jenkins	[1901] 2 Ch. 401	145
Hanfstaengl *v.* American Tobacco Company	[1895] 1 Q. B. 347	201
Hanfstaengl Art Publishing Company *v.* Holloway	[1893] 2 Q. B. 1	201
Hannam *v.* Mockett	2 B. & C. 934	144
Hargreave *v.* Freeman	[1891] 3 Ch. 39	98
Harrison *v.* Kirk	[1904] A. C. 1	683
——— *v.* Rutland (Duke)	[1893] 1 Q. B. 142	142
——— *v.* Stickney	2 H. L. C. 108	325
Harrogate Estates, Ld., In re	[1903] 1 Ch. 498	564
Hart's Patent, In re	25 Rep. Pat. Cas. 209	490
Hartley *v.* Pendarves	[1901] 2 Ch. 498	649
Harvey *v.* Farnie	8 App. Cas. 43	349
——— *v.* Truro Rural Council	[1903] 2 Ch. 638	55
Hayes, In re	[1901] 2 Ch. 529	582
——— *v.* Bridges	1 Ridg. L. & S. 390	403
Hayle's Estate, In re	31 L. J. (Ch.) 612	605
Hayward *v.* Cannington	2 Keble, 290, 311; 1 Sid. 354; 1 Lev. 231	400
Heath *v.* Crealock	L. R. 10 Ch. 22	14
——— *v.* Pugh	6 Q. B. D. 345	13
Hedgely, In re	34 Ch. D. 379	307
Heming *v.* Archer	7 Beav. 515	310
Hemsworth Grammar School and Hospital, In re	12 App. Cas. 444	38
Hennessey *v.* Bray	33 Beav. 96	261
Henry Clay and Bock Company, In re	[1892] 3 Ch. 549	97
Henwood *v.* Overend	13 Ves. 383, n.; 1 Mer. 23	509
Herring *v.* Metropolitan Board of Works	19 C. B. (N.S.) 510	541
Hickman *v.* Maisey	[1900] 1 Q. B. 752	168
Hochster *v.* De la Tour	2 E. & B. 678	133
Hodgson's School, In re	3 App. Cas. 857	35
Hollins *v.* Fowler	L. R. 7 H. L. 757	443
Holmes *v.* Prescott	12 W. R. 636	259
Hope *v.* D'Hédonville	[1893] 2 Ch. 361	76
Hopkins *v.* Hopkins	Cas. t. Tal. 44; 1 Atk. 581; 1 Ves. Sen. 268	258
Howe *v.* Dartmouth (Earl)	7 Ves. 137 a; 1 W. & T. L. C., 7th ed. p. 68	236
Hubbuck, In re	[1896] 1 Ch. 754	236
Hudson's Application, In re	24 Rep. Pat. Cas. 582	96
Hughes *v.* Lloyd	22 Q. B. D. 157	606
Hume *v.* Lopes	[1892] A. C. 112	249
Humphries *v.* Brogden	12 Q. B. 739	482
Hunter *v.* Young	4 Ex. D. 256	683
Huntly (Marchioness) *v.* Gaskell	[1906] A. C. 56	351
Hyett *v.* Mekin	25 Ch. D. 735	639, 649
Hyslop, In re	[1894] 3 Ch. 522	252

I.

Indian Mechanical Gold Extracting Company, In re	[1891] 3 Ch. 538	292

		PAGE
Islington Vestry *v.* Hornsey Urban Council	[1900] 1 Ch. 697	532

J.

Jefferys *v.* Boosey	4 H. L. C. 815	442
Jenkins *v.* Harvey	1 C. M. & R. 877	144
——— *v.* Tucker	1 H. Bl. 90	518
Jersey (Earl) *v.* Uxbridge Rural Sanitary Authority	[1891] 3 Ch. 183	327
———	Unreported	327
Johnson *v.* Kennett	3 My. & K. 624	356
Johnstone *v.* Milling	16 Q. B. D. 460	133
Jolly *v.* M'Gregor	3 W. & S. App. 85	350
Jones *v.* Carter	15 M. & W. 718	133
——— *v.* Johnson	7 Ex. 452	324
Julius *v.* Oxford (Bishop)	5 App. Cas. 214	325

K.

Keene *v.* Dickson	1 Bos. & P. 254, n.	261
Kemp *v.* Sober	1 Sim. (N.S.) 517	380
Kingston's (Duchess) Case	2 Sm. L. C., 11th ed. p. 750	436
Kirby *v.* Harrogate School Board	[1896] 1 Ch. 437	216
Knight *v.* Simmonds	[1896] 1 Ch. 653; [1896] 2 Ch. 294	380
Kodak, Ld. *v.* London Stereoscopic and Photographic Company	20 Rep. Pat. Cas. 337	276

L.

Lacey, In re	[1907] 1 Ch. 330	315
Laing's Trusts, In re	L. R. 1 Eq. 416	77
Lamb *v.* Newbiggin	1 Car. & K. 549	404
Lambert, In re	[1908] 2 Ch. 117	3
Lands Allotment Company, In re	[1894] 1 Ch. 616	244
Lane, In re	14 Ch. D. 856	495
Lapsley *v.* Grierson	8 D. 34; 1 H. L. C. 498	350
Lauderdale Peerage Case	10 App. Cas. 692	351
Leach *v.* Jay	9 Ch. D. 42	13
Leacroft *v.* Maynard	3 Bro. C. C. 233	509
Lechmere and Lloyd, In re	18 Ch. D. 524	259
Le Mesurier *v.* Le Mesurier	[1895] A. C. 517	348
Leonard and Ellis's Trade Mark, In re	26 Ch. D. 288	277
Lewis *v.* Waters	6 East, 336	258
Lindgren *v.* Lindgren	9 Beav. 358	113
Linoleum Manufacturing Company *v.* Nairn	7 Ch. D. 834	277
Linotype Company's Trade Mark, In re	[1900] 2 Ch. 238	278
Liverpool (Rector), Ex parte	L. R. 11 Eq. 15	606
Liverpool Improvement Act, In re	L. R. 5 Eq. 282	505
Livesey *v.* Livesey	3 Russ. 287	662
Lloyd and North London Railway (City Branch) Act, 1861, In re	[1896] 2 Ch. 397	505
Lloyd *v.* Lander	5 Madd. 282	14
Lockyer *v.* Ferriman	3 R. 882	350

		PAGE
Lodge *v.* National Union Investment Company	[1907] 1 Ch. 300	612
London and South Western Railway Company *v.* Bridger	12 W. R. 948	505
London, Brighton and South Coast Railway Company *v.* Truman	11 App. Cas. 45	532
London Union *v.* Acocks	8 C. B. (N.S.) 760	326
Loring *v.* Thomas	1 Dr. & Sm. 497	3, 117, 123
Love *v.* Bell	9 App. Cas. 286	480
Lowry's Will, In re	L. R. 15 Eq. 78	505
Luttrel's Case	4 Rep. 86 a	401
Lyons *v.* Fishmongers' Company	1 App. Cas. 662	540
Lyons (Mayor of) *v.* Advocate-General of Bengal	1 App. Cas. 91	606

M.

M'Bride *v.* M'Govern	[1906] 2 I. R. 181	202
Mackenzie *v.* Childers	43 Ch. D. 265	380
——— *v.* Mackenzie	[1895] A. C. 384	349
Macklin *v.* Richardson	Amb. 694	444
M'Laren *v.* Miller	7 R. 867	627
Macmillan & Co. *v.* Dent	[1907] 1 Ch. 107	444
Magnolia Metal Company's Trade Marks, In re	[1897] 2 Ch. 371	277, 721
Magurn *v.* Magurn	11 Ont. App. Rep. 178	348
Maire, In re	49 Sol. J. 383	249
Malcomson *v.* O'Dea	10 H. L. C. 593	142, 403
Manchester, Sheffield and Lincolnshire Railway Company *v.* Anderson	[1898] 2 Ch. 394	216
Mann *v.* Fuller	Kay, 624	509
Manners (Lord) *v.* Johnson	1 Ch. D. 673	380
Markham *v.* Paget	[1908] 1 Ch. 697	480
Marlborough's (Duke) Settlement, In re	32 Ch. D. 1	710
Master of the Trinity House *v.* Clark	4 M. & S. 288	179
Matthew *v.* Bowler	6 Hare, 110	133
Matthews *v.* Usher	[1900] 2 Q. B. 535	13
Maurice, In re	75 L. T. 415	365
Mawley *v.* Barbet	2 Esp. 687	605
Mayall *v.* Higbey	1 H. & C. 148	442
Mears *v.* Western Canada Pulp and Paper Company	[1905] 2 Ch. 353	228, 243
Mercer *v.* Denne	[1905] 2 Ch. 538	144
Metropolitan Asylum District *v.* Hill	6 App. Cas. 193	218, 531
Meyer *v.* Simonsen	5 De G. & Sm. 723	75
Micklethwait *v.* Newlay Bridge Company	33 Ch. D. 133	404
Midland Railway Company *v.* Edmonton Union	[1895] A. C. 485	328
Miles *v.* Jarvis	24 Ch. D. 633	259
Millar *v.* Taylor	4 Burr. 2303	442
Mills *v.* Colchester Corporation	L. R. 2 C. P. 476	144
Moon, In re	[1907] 2 Ch. 304	309
Moore *v.* Prestea Mines, Ld.	Unreported	65
Mores' Trust, In re	10 Hare, 171	511
Morgan, In re	[1900] 2 Ch. 474	639
Morgan's Case	28 Ch. D. 620	450
Morier, Ex parte	12 Ch. D. 491	683

		PAGE
Morrice *v.* Aylmer	L. R. 7 H. L. 717	494
Morris *v.* Hunt & Co.	12 Times L. R. 187	372
Mundy *v.* Rutland (Duke)	23 Ch. D. 81	480
Munro *v.* Munro	7 Cl. & F. 842	351
Murray *v.* Heath	1 B. & Ad. 804	443
——— *v.* Thorniley	2 C. B. 217	15
Musther, In re	43 Ch. D. 569	3

N.

Nash's Estate, In re	4 W. R. 111	505
Nesbitt *v.* Lawder	17 L. R. Ir. 53	341
New Sharlston Colliery Company *v.* Westmorland (Earl)	[1904] 2 Ch. 443, n.	480
New York Breweries Company *v.* Attorney-General	[1899] A. C. 62	504
Newington Local Board *v.* Cottingham Local Board	12 Ch. D. 725	216
Newman *v.* Piercey	4 Ch. D. 41	192
Newton *v.* Metropolitan Railway Company	1 Dr. & Sm. 583	505
Nisbet and Potts' Contract, In re	[1906] 1 Ch. 386	382
Norfolk's (Duke) Case	3 Ch. Ca. 1; Pol. 223	259
North Eastern Marine Engineering Company *v.* Leeds Forge Company	[1906] 1 Ch. 324; [1906] 2 Ch. 498	616
Nottage (No. 2), In re	[1895] 2 Ch. 657	494
Nottingham Patent Brick and Tile Company *v.* Butler	16 Q. B. D. 778	381

O.

Oakes *v.* Oakes	9 Hare, 666	494
Offin *v.* Rochford Rural Council	[1906] 1 Ch. 342	615
Orme's Case	L. R. 8 C. P. 281	15
Orr-Ewing *v.* Colquhoun	2 App. Cas. 839	145
Osborne *v.* Bradley	[1903] 2 Ch. 446	376, 666
Ovey *v.* Ovey	[1900] 2 Ch. 524	249
Oxenden *v.* Compton (Lord)	2 Ves. Jun. 69	639

P.

Page *v.* Adam	4 Beav. 269	360
Panhard et Levassor (Société Anonyme) *v.* Panhard Levassor Motor Company	[1901] 2 Ch. 513	721
Parker *v.* Great Western Railway Company	7 Man. & G. 253	470
Partridge *v.* Bere	5 B. & Al. 604	14
Patent Carriage Company, In re	L. R. 2 Eq. 349	134
Penticost *v.* Ley	2 Jac. & W. 207	113
Pepin *v.* Bruyère	[1902] 1 Ch. 24	238
Peter *v.* Stirling	10 Ch. D. 279	365
Petrie *v.* Ross	3 Sc. L. T. 250; 4 Sc. L. T. 94	349
Phillips *v.* Cayley	43 Ch. D. 222	581
Pickard, In re	53 L. T. 293	639
Pickering *v.* Pickering	4 My. & Cr. 289	236
Piercy, In re	[1895] 1 Ch. 83	238

		PAGE
Pilkington *v.* Wignall	2 Madd. 240	64
Pinto *v.* Badman	8 Rep. Pat. Cas. 181	720
Pitcairn, In re	[1896] 2 Ch. 199	236
Pitt *v.* Pitt	4 Macq. 627	347
Poole *v.* National Bank of China, Ld.	[1907] A. C. 229	288
Portal and Lamb, In re	30 Ch. D. 50	113
Powers *v.* Bathurst	49 L. J. (Ch.) 294	583
Preston Banking Company *v.* Allsup & Sons	[1895] 1 Ch. 141	661
Price's Patent Candle Company's Trade Mark, In re	[1907] 2 Ch. 435	100
Priestman *v.* Thomas	9 P. D. 70, 210	432
Prince Albert *v.* Strange	2 De G. & Sm. 652; 1 Mac. & G. 25; 1 H. & T. 1	443
Purefoy *v.* Rogers	2 Wms. Saund. 380	259
Purves' Trustees *v.* Purves	22 R. 513	350

R.

Race *v.* Ward	4 E. & B. 702	163
Ram Tuhul Singh *v.* Biseswar Lall Sahoo	L. R. 2 Ind. Ap. 131	518
Ranson *v.* Bird	Unreported	65
Rebbeck, In re	[1894] W. N. 68; 42 W. R. 473	356
Reddaway *v.* Banham	[1896] A. C. 199	720
Rees, In re	60 L. T. 260	69
Reg. *v.* Bedlington Overseers	48 J. P. 486	325
—— *v.* Berry	28 L. J. (M. C.) 86	688
—— *v.* Bishop Wearmouth (Burial Board of)	5 Q. B. D. 67	606
—— *v.* Burleigh Board of Health	1 L. T. 92	324
—— *v.* Darlington Local Board of Health	6 B. & S. 562	539
—— *v.* D'Oyly	12 Ad. & E. 139	605
—— *v.* East Mark (Inhabitants)	11 Q. B. 877	588
—— *v.* Hartington (Inhabitants)	4 E. & B. 780	434
—— *v.* Hawkhurst	7 L. T. 268	588
—— *v.* Hutchings	6 Q. B. D. 300	432
—— *v.* Keyn	2 Ex. D. 63	469
—— *v.* Leigh Rural Council	[1898] 1 Q. B. 836	324
—— *v.* Lightfoot	6 E. & B. 822	688
—— *v.* Petrie	4 E. & B. 737	588
—— *v.* Reid	13 Q. B. 524	326
—— *v.* Rotherham Local Board	8 E. & B. 906	324
—— *v.* St. Margaret, Leicester (Select Vestry of)	10 Ad. & E. 730	605
Renals *v.* Cowlishaw	9 Ch. D. 125; 11 Ch. D. 866	374
Rex *v.* Coleridge	2 B. & Al. 806	606
—— *v.* Ellis	1 M. & S. 652	141
—— *v.* Lloyd	1 Camp. 260	588
—— *v.* Martin Rice	1 Ld. Raym. 138	606
Rhodes *v.* Pateley Bridge Union	51 L. T. 235	326
Rich *v.* Whitfield	L. R. 2 Eq. 583	710
Richards *v.* Revitt	7 Ch. D. 224	380
Richardson *v.* Horton	7 Beav. 112	309
Ridge, In re	31 Ch. D. 504	76
Rigby *v.* Connol	14 Ch. D. 482	627
Rigg *v.* Lonsdale (Earl)	1 H. & N. 923	145, 401

		PAGE
Ringland *v.* Lowndes	15 C. B. (N.S.) 173	324
Rivers (Lord) *v.* Adams	3 Ex. D. 361	401
Robbins *v.* Whyte	[1906] 1 K. B. 125	13
Roberts *v.* James	89 L. T. 282	588
——— *v.* Walker	1 Russ. & My. 752	80
Robinson *v.* Duleep Singh	11 Ch. D. 798	404
Roderick *v.* Aston Local Board	5 Ch. D. 328	541
Rogers *v.* Hosegood	[1900] 2 Ch. 388	380
——— *v.* Price	3 Y. & J. 28	518
Rolt, In re	[1908] W. N. 76	581
Rooke *v.* Kensington (Lord)	2 K. & J. 753	615
Ross *v.* Charity Commissioners	7 App. Cas. 463	38
Russel *v.* Buchanan	2 C. & M. 561	261
Ruttinger *v.* Temple	4 B. & S. 491	689

S.

St. Botolph - without - Bishopsgate Parish Estates, In re	35 Ch. D. 142	604
St. Martin's, Birmingham (Rector), Ex parte	L. R. 11 Eq. 23	606
St. Pancras Burial Board, In re	L. R. 3 Eq. 173	606
Salmon, In re	42 Ch. D. 351	225
Salomon *v.* Brownfield	12 Times L. R. 239	371
Saul *v.* Wigton Rural Sanitary Authority	56 L. T. 438	325
Savill Brothers, Ld. *v.* Bethell	[1902] 2 Ch. 523	13
Sayers *v.* Collyer	28 Ch. D. 103	382
Scarf *v.* Jardine	7 App. Cas. 345	133
Scott *v.* Fenoulhett	1 Cox, 79	191
—— *v.* Scott	9 L. R. Ir. 367	648
Scottish Petroleum Company, In re	23 Ch. D. 413	232
Searle, In re	[1900] 2 Ch. 829	74
Selsey (Lord) *v.* Lake (Lord)	1 Beav. 146	191
Selwin *v.* Brown	3 Bro. P. C. 607	255
Selwood *v.* Mildmay	3 Ves. 306	113
Selwyn *v.* Garfit	38 Ch. D. 273	20
Serjeant *v.* Nash, Field & Co.	[1903] 2 K. B. 304	133
Seymour *v.* Courtenay (Lord)	5 Burr. 2814	403
Sharland, In re	74 L. T. 664	341
Shaw *v.* Gould	L. R. 3 H. L. 55	348
Shedden *v.* Patrick	1 Macq. 535	351
Shelfer *v.* City of London Electric Lighting Company	[1895] 1 Ch. 287	382
Shoe Machinery Company *v.* Cutlan	12 Rep. Pat. Cas. 530	435
Sidney *v.* Clarkson	35 Beav. 118	381
Simpson *v.* Bloss	7 Taunt. 246	616
Simson *v.* Ingham	2 B. & C. 65	656
Singer Manufacturing Company *v.* Loog	8 App. Cas. 15	278
Sir John Jackson, Ld. *v.* Owners of Steamship Blanche	24 Times L. R. 384; [1908] A. C. 126	179
Slater, In re	[1906] 2 Ch. 480; [1907] 1 Ch. 665	113
Sleeth *v.* Thorington	2 Ves. Sen. 560	191
Slipper *v.* Tottenham and Hampstead Junction Railway Company	L. R. 4 Eq. 112	216
Smith *v.* Andrews	[1891] 2 Ch. 678	142

		PAGE
Smith *v.* Law Guarantee and Trust Society	[1904] 1 Ch. 500; [1904] 2 Ch. 569	655
—— *v.* Southampton Corporation	[1902] 2 K. B. 244	327
Smokeless Powder Company's Trade Mark, In re	[1892] 1 Ch. 590	96
Société Maritime et Commerciale *v.* Venus Steam Shipping Company	9 Com. Cas. 289	617
Somerset (Duke) *v.* Fogwell	5 B. & C. 875	143
Somerville *v.* Schembri	12 App. Cas. 453	98
South Eastern Railway Company and Wiffin's Contract, In re	[1907] 2 Ch. 366	217
South Wales Railway Company, In re	14 Beav. 418	505
Southey *v.* Sherwood	2 Mer. 435	444
Spargo's Case	L. R. 8 Ch. 407	231
Spicer *v.* Martin	12 App. Cas. 12	374
Staffordshire County Council *v.* Seisdon Rural Council	5 L. G. R. 347	554
Standfield's Patent, In re	15 Rep. Pat. Cas. 17	490
Staniar *v.* Evans	34 Ch. D. 470	663
Stead *v.* Newdigate	2 Mer. 521	678
Stebbing *v.* Walkey	2 Bro. C. C. 85	191
Steed *v.* Preece	L. R. 18 Eq. 192	639, 648
Stephenson, In re	[1897] 1 Ch. 75	192
Stevens *v.* Jeacocke	17 L. J. (Q.B.) 163	689
Stewart *v.* Stewart	15 Ch. D. 539	502
Stewart's Patent, In re	3 Rep. Pat. Cas. 7	489
Stokes, In re	52 Sol. J. 11	119
—— *v.* Lewis	1 T. R. 20	518
Strong *v.* Bird	L. R. 18 Eq. 315	251
Stroud *v.* Wandsworth District Board of Works	[1894] 1 Q. B. 64; [1894] 2 Q. B. 1	533
Stroughill *v.* Anstey	1 D. M. & G. 635	356
Sutherland (Duke) *v.* Heathcote	[1892] 1 Ch. 475	144
Swaine *v.* Wilson	24 Q. B. D. 252	627
Swire *v.* Burley Local Board of Health	23 J. P. 420	324

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	573
Taylor *v.* Chester	L. R. 4 Q. B. 309	616
Teape's Trusts, In re	L. R. 16 Eq. 442	581
Tench *v.* Cheese	6 D. M. & G. 453	80
Thames Tunnel (Rotherhithe and Ratcliff) Act, 1900, In re	[1908] 1 Ch. 493	504
Thompson *v.* Miller	13 Rep. Pat. Cas. 35	97
Thornber *v.* Wilson	4 Drew. 350	606
Thrower's Case	1 Vent. 208	587
Tiverton and North Devon Railway Company *v.* Loosemore	9 App. Cas. 480; 27 Ch. D. 25	455, 459, 646
Tomlin's Case	[1898] 1 Ch. 104	133
Tozer *v.* Child	7 E. & B. 377	443
Trinder *v.* Trinder	L. R. 1 Eq. 695	113
Trinity College, Cambridge *v.* Browne	1 Vern. 441	12
Tucker *v.* Vowles	[1893] 1 Ch. 195	381
Tunbridge Wells Corporation *v.* Baird	[1896] A. C. 434	52
Turner *v.* Robinson	10 Ir. Ch. Rep. 121, 510	444
—— *v.* Walsh	6 App. Cas. 636	588

		PAGE
Twigg's Estate, In re	[1892] 1 Ch. 579	501
Twycross *v.* Grant	2 C. P. D. 469	244

U.

Upmann *v.* Forester	24 Ch. D. 231	201

V.

Valentine *v.* Penny	Noy, 145	403
Vavasseur *v.* Krupp	9 Ch. D. 351	443
Venn and Furze's Contract, In re	[1894] 2 Ch. 101	356
Vernon *v.* St. James, Westminster (Vestry)	16 Ch. D. 449	532
Victorian Daylesford Syndicate *v.* Dott	[1905] 2 Ch. 624	615

W.

Waddington *v.* London Union	E. B. & E. 370	325
Walker *v.* Denne	2 Ves. Jun. 170	711
Wallace *v.* Evershed	[1899] 1 Ch. 891	65
——— *v.* Greenwood	16 Ch. D. 362	640
Warwick *v.* Queen's College, Oxford	L. R. 6 Ch. 716	402
Waterhouse, In re	96 L. T. 688; 98 L. T. 30	581
Waterman *v.* Ayres	39 Ch. D. 29	278
Watson, In re	[1896] 1 Ch. 925	71
——— *v.* Watson	17 R. 736	349
Watt *v.* Watt	Not reported	348
Weale *v.* Lower	Pol. 54	258
Webb *v.* Direct London and Portsmouth Railway Company	9 Hare, 129	457
Weeding, In re	[1896] 2 Ch. 364	495
Wenlock (Baroness) *v.* River Dee Company	10 App. Cas. 354	469
Wentworth *v.* Wentworth	[1900] A. C. 163	74
Werderman *v.* Société Générale d'Électricité	19 Ch. D. 246	127
West Ham Union *v.* St. Matthew, Bethnal Green (Churchwardens)	[1896] A. C. 477	328
Westminster City Council *v.* St. Martin-in-the-Fields (Vicar and Churchwardens)	5 L. G. R. 500	606
Wheeler, In re	[1904] 2 Ch. 66	71, 683
Whitfield *v.* Bewit	2 P. Wms. 240	273
Wickham *v.* Hawker	7 M. & W. 63	144, 402
Willingale *v.* Maitland	L. R. 3 Eq. 103	403
Wilson *v.* Crossfield	1 Times L. R. 601	142
——— *v.* McMath	3 Phillim. 67	605
——— *v.* Willes	7 East, 121	427
Winans *v.* Attorney-General	[1904] A. C. 287	351
Winter *v.* Anson (Lord)	3 Russ. 488	133
Winterbottom *v.* Derby (Lord)	L. R. 2 Ex. 316	588
Wirty *v.* Pemberton	2 Eq. C. Ab. 279	12
Wolfe *v.* Matthews	21 Ch. D. 194	627
Wood *v.* Veal	5 B. & Al. 454	588
Wood's Trade Mark, In re	32 Ch. D. 247	98

		PAGE
Woods, In re	[1904] 2 Ch. 4	75
—— *v.* Reed	2 M. & W. 777	328
Worthington *v.* Hulton	L. R. 1 Q. B. 63	324
Wotherspoon *v.* Currie	L. R. 5 H. L. 508	720
Wrightson, In re	[1904] 2 Ch. 95	256
Wye Valley Railway Company *v.* Hawes	16 Ch. D. 489	224

Y.

Yates *v.* Yates	28 Beav. 637	75
Yolland, Husson & Birkett, Ld., In re	[1908] 1 Ch. 152	564
Yorkshire Miners' Association *v.* Howden	[1905] A. C. 256	624
Young *v.* Kingston-on-Thames, &c., Joint Burials Committee	[1907] 1 K. B. 416	84

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re COPE.

CROSS *v.* CROSS.

[1907 C. 2394.]

C. A.
1908
May 7, 14.

Will—Construction—Substitutionary Gift—Words of Futurity—Child dead at Date of Will leaving Issue.

A testator gave his residuary estate in trust (subject to a life estate for the benefit of his wife, who predeceased him) for all his children who attained the age of twenty-one years in equal shares, "Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent or parents had survived me (subject nevertheless to the proviso hereinafter contained) Provided always that if any child of mine shall die in the lifetime of my said wife leaving a husband or wife who shall survive her then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine":—

Held, that the residuary gift did not include the children of a child dead at the date of the will or the husband or wife of any such last mentioned child.

APPEAL from a decision of Swinfen Eady J.

The Rev. Francis Haden Cope, by his will dated June 17, 1901, gave his residuary estate upon trust for his wife for life, and after

C. A. 1908 COPE, *In re.* CROSS *v.* CROSS.

her decease "In trust for all my children who being sons or daughters have attained the age of twenty-one years in equal shares Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent or parents had survived me (subject nevertheless to the proviso hereinafter contained) Provided always that if any child of mine shall die in the lifetime of my said wife leaving a husband or wife who shall survive her then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine during his or her life without power of anticipation."

The testator survived his wife (who died in 1902) and died on February 26, 1906.

There were seven children of the marriage. Of these children two, Katherine Ellen and Francis Haden, died before the date of the testator's will after having attained the age of twenty-one years.

Katherine Ellen Cope married the defendant the Hon. J. E. Cross, and there was issue of the marriage one child, the plaintiff Katherine Madge Cross, an infant. Francis Haden Cope married the defendant Katherine Elizabeth Frere Cave Brown Cave (then Katherine Elizabeth Frere Cox), and there was issue of the marriage one child, the plaintiff Beatrice Haden Cope, an infant. The other five children of the testator were all living and had all attained the age of twenty-one years.

An originating summons was taken out by the two said infant granddaughters of the testator to determine whether, upon the true construction of the will and in the events which had happened, they would on attaining twenty-one years or marrying respectively become absolutely entitled to the shares in the residuary estate which their deceased parents would have taken

had they survived the testator, and, further, whether their surviving parents took life interests in such respective shares.

Swinfen Eady J. held that the case was governed by *Loring* v. *Thomas* (1), and answered both questions in the affirmative.

The surviving children of the testator appealed.

Micklem, K.C., and *Earle*, for the appellants. Prima facie the words "shall die" import futurity, and there is no context in this will to justify the Court in giving to those words any other than this natural meaning: *Gorringe* v. *Mahlstedt* (2); *In re Musther*. (3)

[They were stopped.]

Younger, K.C., and *Northcote*, for the testator's two grandchildren. This case falls within the principle of *Loring* v. *Thomas* (1), *Barraclough* v. *Cooper* (4), and *In re Lambert*. (5) There is no ground here for depriving the children of parents who happen to be dead at the date of the will of all interest in the residue by adopting the stricter construction. *Gorringe* v. *Mahlstedt* (2) is distinguishable.

F. L. Wright, for the surviving parents of the grandchildren.

Micklem, K.C., in reply.

Cur. adv. vult.

May 14. COZENS-HARDY M.R. This appeal raises the question whether grandchildren living at the testator's death, whose parents were dead at the date of his will, take a share of residue, and a further question whether the surviving husband and wife of such parents also take benefits under the will. I think the only safe course in construing a will of this nature is to adhere to the natural and grammatical meaning of the words used, and I doubt whether much advantage can be gained by referring to authorities dealing with other wills in which similar language is used. Our duty is to ascertain the testator's intention from the language of his will. In approaching this task we must recognize

(1) (1861) 1 Dr. & Sm. 497.
(2) [1907] A. C. 225.
(3) (1890) 43 Ch. D. 569.
(4) Unreported; since reported in a note to *In re Lambert*, see post, p. 121.
(5) [1908] W. N. 111; post, p. 117.

C. A. 1908 COPE, *In re.* CROSS *v.* CROSS. Cozens-Hardy M.R.

that words are not always used with strict accuracy, and that a context may suffice to give an enlarged meaning, or that such enlarged meaning may be inferred from a consideration of the will as a whole. The judgment of that very learned judge Vice-Chancellor Kindersley in *Loring* v. *Thomas* (1) is a well-known illustration of this rule. Thus words which import futurity, such as "*shall die*," may be read as equivalent to "shall *be dead*," if there is sufficient to justify this upon the fair construction of the will as a whole. But subject to this qualification, the natural meaning of words ought to be adhered to, without regard to consequences.

Now the testator gave his residuary estate to trustees upon trust for his wife for life. She predeceased him. After her death he gave it "in trust for all my children who being sons or daughters have attained the age of twenty-one years in equal shares." It seems to me that no importance can be attached to the words "*have* attained." They only mean this, that no child can claim a share who cannot prove that he has attained that age. The clause which I have read plainly does not contemplate deceased children. But then follow two provisoes upon which the difficulties arise, the first dealing with *some* grandchildren, and the second dealing with *some* husbands and wives. In form, each is a proviso, something to qualify a prior clause, as distinct from a separate and independent gift. The first proviso is as follows: "Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent or parents had survived me (subject nevertheless to the proviso next hereinafter contained)." Now every word of that proviso is satisfied by confining it to the case of a child living at the date of the will but dying subsequently before the testator leaving issue who survive the testator. Such a child was within

(1) 1 Dr. & Sm. 497.

the contemplation of the prior trust, and was only prevented from taking by reason of not having survived the testator. This is the primary and natural meaning of the words used. To hold that it applies to grandchildren whose parent never could have taken under the prior trust is to strain the language. The second proviso is as follows: "Provided always that if any child of mine shall die in the lifetime of my said wife leaving a husband or wife who shall survive her then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go to and be payable to such husband or wife of such deceased child of mine during his or her life without power of anticipation." I feel great difficulty in understanding how this proviso can be tacked on to, or have any bearing upon, the first proviso. Yet I think it throws some light upon the rest of the will. It contemplates, and it only contemplates, the death of a child *in the lifetime of the wife*, and it is scarcely possible to suppose that the death so contemplated was not a death subsequent to the date at which the will was executed. I cannot hold that the testator, who must be presumed to know which of his grandchildren were living, intended by these words to include a child whom he knew to be dead. On this ground I think the order of Swinfen Eady J. was wrong in so far as it declared that the surviving husband and wife of these children take life interests.

This conclusion helps me greatly in construing the first proviso. For it is reasonably clear that the grandchildren are only to take subject to the life interests of their surviving parents, and the two must stand or fall together.

Upon the whole I think the view of the learned judge was wrong on both points and that this appeal must be allowed.

Our attention was very properly called to an unreported case of *Barraclough* v. *Cooper* (1), which was greatly relied on by Mr. Younger. I have had an opportunity of reading the testator's will in that case and the judgments of Kekewich J., Romer L.J., and Lords Halsbury, Macnaghten, and Lindley. It seems to me to be a reasonably plain case, and one which does not really assist us. The testator had several children living at

(1) Unreported; since reported, post, p. 121.

C. A. 1908 — COPE, *In re.* CROSS *v.* CROSS. — Cozens-Hardy M.R.

the date of his will and named in his will, and also a granddaughter, Mary Cooper, whose mother died before the date of his will. He made certain specific dispositions in favour of each of his named children and Mary Cooper. The ultimate residue was given "upon *trust for my children in equal shares*," the share of each daughter being settled and the income made payable to her during her life, with remainder to her children at twenty-one or marriage. This plainly contemplated only children living at the date of the will. Then followed this clause: "I declare that if any child of mine shall die in my lifetime and any issue of such child shall be living at my decease then the shares as well accruing as original to which the child so dying would if living at my decease have been entitled of and in my residuary real and personal estate directed to be sold and converted as aforesaid shall be held by my trustees upon such trusts and subject to such provisions as the same would have been held if such child had died immediately after my decease." The effect of this was to enlarge the class of persons to take by adding Mary Cooper, and the gift was original and not by way of substitution. In the language of Romer L.J., whose judgment was approved in the House of Lords, "the original gift is to a class of persons to be ascertained at the death of the testator, while the subsequent provision in favour of issue is not, properly speaking, a substitutionary gift, but makes an addition to the class of persons taking under the original gift by reference to the issue of what I may call certain hypothetical persons." And there were other parts of the will which made it clear that the testator did not intend to cut out Mary Cooper: see Lord Lindley's judgment. There is nothing in *Barraclough* v. *Cooper* (1) which prevents me from giving effect to that which, for the reasons I have given, seems to me to be the proper construction of the will in the present case. And although I prefer not to rely upon authorities in a case of this nature, I think my view is supported by the subsequent decision of the House of Lords in *Gorringe* v. *Mahlstedt.* (2)

(1) Unreported; since reported, post, p. 121.
(2) [1907] A. C. 225.

BUCKLEY L.J. When this testator on June 17, 1901, made his will, he had five children living, and two children—Katherine and Francis—had previously died, each leaving a child who was then living. These two children are the plaintiffs in the action. The question is whether they, being issue of children who were dead at the date of the will, take under the disposition in the will.

Subject to a gift to his widow for her life, the testator disposed of his property in favour of his children who, "being sons or daughters, have attained the age of twenty-one, in equal shares," subject to two provisoes. The first proviso is to take effect if a child shall die in the testator's lifetime leaving children who shall survive him, &c. The second proviso is one to take effect if any child of the testator shall die in the lifetime of his wife leaving a husband or wife who shall survive her. The first proviso is to have effect "subject nevertheless to the second proviso." From this it follows that the second proviso must include cases which fall under the first proviso. The second proviso speaks of "the share of any deceased child"; but inasmuch as the second proviso is to have effect in the events mentioned in the first proviso, it must have effect where the child has died in the testator's lifetime, and therefore can take no share. The result is that the words "the share of any deceased child of mine" in the second proviso must include the share which a child would have taken if the child had survived the testator. The first proviso takes effect only if the child dies leaving children. The second proviso is not controlled by that contingency. The second proviso is not "if any child of mine shall *so* die," but "if any child of mine shall die," &c. The second proviso, I think, includes, but is not restricted to, the cases which fall within the first proviso.

Having made these preliminary observations, I come to the only question which we have to decide, namely, whether the grandchildren of the testator, being children of a child of his who was dead at the date of the will, take. In my opinion they do not. I am able to give full effect to every word of this will, if I read it in its correct and primary meaning. The first gift is to children. This cannot include children who were dead at the date of the will. That is followed by a proviso which prima facie operates to qualify that which precedes. I must, no doubt, look

C. A. 1908 COPE, *In re.* CROSS *v.* CROSS. Buckley L J.

at the language and see whether it is so expressed as that I must take it as a mere qualification of the previous gift, or whether its true effect is to operate as a new gift. I must see whether it is a substitutional or whether it is an original gift. I can give full effect to it if I take it to express that which the words plainly convey, namely, a substitution for the children living at the date of the will, who by reason of death in the testator's lifetime fail to take, of a defined class of children of that child. The same is true of the second proviso. If I substitute in the second proviso, as I think I must, the words "share which the child would have taken if he had survived me" for "share of the deceased child," I am in no further difficulty than if I read the words in their strict sense and understand them to mean the share of a child who survived the testator and subsequently died in the wife's lifetime.

We are pressed with the decision in *Loring* v. *Thomas*. (1) I may point out (although not as controlling my view upon this will) that we have not here, as in *Loring* v. *Thomas* (1), any such words as that the grandchild shall represent and stand in the place of the child. In my judgment, however, it would be erroneous, or misleading, to deal with this case by reading first the will in *Loring* v. *Thomas* (1) and then seeing how this will differs from that will. I must read this will; and, reading it, I find plain provisions for the testator's children which must mean such of them as can take, excluding therefore necessarily children who, at the date of the will, were already dead, and I can give full effect to the provisoes by saying that they are addressed to the case of children of persons being sons or daughters of the testator who, being alive at the date of the will, might have taken, but, by reason of death before the testator, may have failed to take. Under these circumstances, it would be doing violence to the language to substitute for the words "shall die" the words "shall have died." The respondents' argument seeks to read the will as if it were "Provided always that in the case of any child of mine dead in my lifetime," &c. These are not the words. The words "shall die" in this will, I think, are apt words of futurity expressive of the event of the death in the testator's

(1) 1 Dr. & Sm. 497.

lifetime of some member of the class (namely, his children) who, at the date of his will, were competent to take because they were then alive, but who might fail to take by reason of death in his lifetime, but do not extend to the case of children who, at the date of the will, could not take, because their lives already had dropped.

For these reasons I think that Katherine and Francis are not, for the purposes of this will, children of the testator in favour of whose children, or of whose surviving husband or wife, the testator has disposed of his estate.

KENNEDY L.J. In my opinion the judgment of the learned judge in the Court below must be reversed.

In construing wills, as in construing other documents of legal import, we are bound not to assign a non-natural meaning to words or phrases, unless either the context or the undoubted meaning of other parts of the document compel us to do so, in order fairly to give sense and coherence to the whole. Here the words "if any child of mine shall die in my lifetime" naturally import futurity, and do not naturally refer to the event of a child's death in the past. I cannot find in the context, or elsewhere in the terms of the will, any support such as Kindersley V.-C. found in the language of the will which was the subject of the judgment in *Loring* v. *Thomas* (1), upon which the respondents so much relied, for the preference of a non-natural interpretation, so as to make the testator's reference include the case of a child whose death had preceded the making of the will. On the contrary, as the Master of the Rolls has pointed out, the words in the second and next following proviso, "if any child of mine shall die in the lifetime of my said wife," tend to confirm the correctness of the appellants' contention. Clearly in those later words the testator is contemplating the possible survival of his wife, and, in reference to that possibility, is dealing with the case of the death of a child during that future period. It would be strange if he should treat as a possible future event the death of a child which, as he well knew, had already died in the lifetime of both himself and his wife.

(1) 1 Dr. & Sm. 497.

C. A. 1908 COPE, *In re.* CROSS *v.* CROSS.

There appears to be no good ground for supposing that in the reference to "any child" in the one proviso the testator was intending to denote a different category from that which he intended to denote in the other proviso.

Solicitors: *Gibson & Weldon, for G. & R. Hill, Malvern; Field, Roscoe & Co., for H. Greenall, Warrington.*

H. B. H.

C. A. 1908 *May* 8, 11, 16.

COPESTAKE *v.* HOPER.

[1906 C. 679.]

Heriot—Freehold of Manor—Tenant—"Dying seised"—Mortgage—Mortgagor in possession.

A mortgagor in possession of customary freeholds is not so "seised" thereof that on his death the lord of the manor is entitled to claim his best beast as a heriot, pursuant to the custom of the manor.

Decision of Kekewich J., [1907] 1 Ch. 366, reversed.

APPEAL from the decision of Kekewich J. (1)

The question raised by this appeal was whether a mortgagor in possession of certain customary freeholds was on his death so "seised" thereof that the lord of the manor was entitled to claim his best beast as a heriot, pursuant to the custom of the manor. The facts, so far as material for the purposes of this report, were as follows:—

In 1863, one Richard Hoper became the owner in fee of certain ancient freehold tenements held of the lord of the manor of Ewhurst.

By an indenture of statutory mortgage of November 1, 1887, Richard Hoper conveyed the said tenements unto and to the use of one Henry Herbert Browell in fee simple by way of mortgage to secure certain principal moneys and interest therein mentioned.

In March, 1905, Richard Hoper died without having redeemed the said mortgage, but being still in possession. The plaintiff, as lord of the manor, claimed to be entitled to Richard Hoper's

(1) [1907] 1 Ch. 366.

best beast as a heriot and brought this action against his executors to enforce his claim. The material allegations of the amended statement of claim were as follows :—

"2. Within the said manor there are several ancient freehold tenements held of the lord thereof by fealty suit of court an annual quit rent a relief of one year's rent on the death of the tenant or alienation of the tenement and a heriot of the best beast of the tenant on his death.

"2 a. The origin of the said heriot is obscure by reason of its remote antiquity prior to the statute "Quia emptores terrarum." The plaintiff alleges in the first place that it is heriot custom and the custom of the said manor is that a heriot of the tenant's best beast is due to the lord on the death of every tenant holding to him and his heirs freely of the lord of the said manor any of the said ancient freehold tenements and dying solely seised thereof. In the alternative the plaintiff alleges that the said heriot is heriot service.

"3. The said ancient freeholds are conveyed by the ordinary assurances operating under either the Statute of Uses or by the common law and the conveyances do not require enrolment on the court rolls of the manor nor is any licence of the lord to alienate or notice to the lord of death or alienation necessary. But as deaths or alienations are brought to the knowledge of the homage presentments are made by them and enrolled in the court rolls of the devolutions of the interests of the tenants of such ancient freeholds.

"5. On the 26th day of March 1905 the said Richard Hoper died solely seised or possessed and entitled to him and his heirs of the said tenement known as 'Capons' and thereupon happened to the plaintiff as such lord of the said manor as aforesaid a relief of one year's rent of the said tenement and a heriot of the best beast of the said Richard Hoper."

The defendants denied that Richard Hoper died "seised" and relied on the mortgage of November, 1887.

Kekewich J. held that Richard Hoper was so "seised" of the tenement that the lord was entitled to take his best beast as a heriot.

The executors of Richard Hoper appealed.

C. A. 1908 COPESTAKE v. HOPER.

Jessel, K.C., and *A. J. Allen*, for the appellants. The mortgagor was not seised as a tenant within the manor at the time of his death so as to entitle the lord to the heriot. The word "seised" is inappropriate to describe the equitable interest of a mortgagor; it is not strictly accurate to speak of a person being seised in equity. The heriot is the debt of the tenant in fee of the lord, and to entitle the lord to the heriot the seisin must be in the tenant. It is not actual physical possession which makes the heriot leviable. If the tenant is tenant in fee, although he parts with the physical possession, the heriot is still leviable. For this purpose there is no difference between heriot service and heriot custom. In considering whether the heriot is leviable the legal ownership only is regarded; accordingly the heriot does not become due on the death of a cestui que trust: Watkins on Copyholds, 4th ed. vol. ii. p. 113; Scriven on Copyholds, 7th ed. p. 250; *Trinity College, Cambridge* v. *Browne*. (1) Further, the tenant must be solely seised, and it became a common mode of evading the lord's rights to make a feoffment to several persons, including generally the beneficial owner, so that on the death of one the estate would survive to the others, and thus, by keeping up the members by the making of fresh feoffments as occasion required, the lord would be deprived of the fruits of descents and wardships: Hayes' Conveyancing, 4th ed. vol. i. p. 43; *Wirty* v. *Pemberton*. (2) It was to stop these abuses that the Statute of Uses was passed. Seisin means possession of a freehold estate: Co. Litt. 201a.

[KENNEDY L.J. referred to Pollock and Maitland's History of English Law, vol. ii. p. 110 sqq.

BUCKLEY L.J. Mr. Joshua Williams in his book on Real Property, 12th ed. p. 100, speaks of seisin as equivalent to feudal possession.]

A reversioner may be seised, yet he has no right to actual possession against his tenant. Looking at the incidents of a mortgage, how can it be said that a mortgagor is seised? At common law a mortgagor cannot lease; he cannot, as a general rule, commit waste; and the mortgagee may turn him out at a moment's notice. The possession of a mortgagor is a possession

(1) (1686) 1 Vern. 441. (2) (1708) 2 Eq. C. Ab. 279.

by the will of the mortgagee and is really the possession of the mortgagee; in an action for ejectment the mortgagee is a necessary party. The seisin cannot be in both the mortgagee and the mortgagor, because there cannot be two persons having seisin at the same time; nor can there be a grant with a use shifting the seisin according as the grantor or grantee is in possession: *Savill Brothers, Ld.* v. *Bethell.* (1) Even before the Real Property Act, 1845, seisin passed by grant without livery of seisin where the estate was not in possession, but in reversion—*Doe* v. *Cole* (2)—and since the passing of that Act livery of seisin is not required to pass the seisin when the estate is in possession, but it will pass by deed of grant: Williams on Real Property, 12th ed. p. 181; and the fact that this mortgage is a statutory conveyance makes no difference. Therefore the seisin passed to the mortgagee by the mortgage deed. This is the view of the law adopted by Challis on Real Property, 2nd ed. pp. 377, 379; Goodeve on Law of Real Property, 5th ed. p. 361.

Before the Judicature Act, 1873, s. 25, sub-s. 5, a mortgagor, being no longer the owner of the reversion, could not sue the tenant in ejectment; and his right to act as agent for the mortgagee was and is very limited: *Matthews* v. *Usher* (3), where the position of a mortgagor in possession is discussed. *Robbins* v. *Whyte* (4) is another illustration of this. The mortgagor only keeps possession during the mortgagee's pleasure: Fisher on Mortgages, 5th ed. p. 421.

In *Casborne* v. *Scarfe* (5), *Heath* v. *Pugh* (6), and *Christophers* v. *Sparke* (7), relied on by the respondents, the Courts were only considering what in a Court of Equity ought to be regarded as equivalent to seisin; and there is nothing in any of those cases to the effect that there is any seisin at law in the mortgagor. *Leach* v. *Jay* (8) turned entirely on the words "die seised" in that particular will. That decision is not against our contention. "Seisin" so as to be entitled to an estate by curtesy is discussed in Co. Litt. 29a.

(1) [1902] 2 Ch. 523.
(2) (1827) 7 B. & C. 243.
(3) [1900] 2 Q. B. 535, 538.
(4) [1906] 1 K. B. 125.
(5) (1737) 1 Atk. 603.
(6) (1881) 6 Q. B. D. 345.
(7) (1820) 2 Jac. & W. 223.
(8) (1878) 9 Ch. D. 42.

C. A. 1908

COPESTAKE v. HOPER.

An equity of redemption is not an estate, but an interest only: *Lloyd* v. *Lander*. (1) A mortgagor left in possession cannot be said to be in the position of a disseisor: *Doe* v. *Williams*. (2) The mortgagor in possession is tenant of the mortgagee: *Partridge* v. *Bere* (3); *Doe* v. *Edwards*. (4) Ever since 1845 "seisin" and "legal estate" have been considered synonymous—e.g., in *Heath* v. *Crealock*. (5)

[Preston on Abstracts, vol. iii. p. 368, was referred to.]

Ingpen, K.C., and *R. Burleigh Muir*, for the respondent, the lord of the manor. The custom as to heriots arises from the relation of lord and tenant as existing prior to the statute of "Quia Emptores" and is connected with "seisin" in the feudal sense; it has nothing to do with "legal estate," which came into existence long after the statute of "Quia Emptores." The heriot was due on the death of a tenant who was sole owner in fee simple, either legal or equitable. Hoper, the mortgagor, was the tenant of the lord at his death in the sense above mentioned. A mortgagee is not a tenant of the lord; he has no ownership, he is a mere pledgee, and has no "seisin" in the feudal sense, and under a common law conveyance had no seisin before entry.

Heriot service arises from the feudal contract; heriot custom from grant or agreement which has ripened into custom; it grew out of the contract under which tenants received permission to cultivate for their own benefit on condition of certain services: Bacon's Abridgment, vol. iv. p. 205. The only heriot now surviving is the villein heriot, under which the lord took the best beast of his tenant at the time of his death: Watkins on Copyholds, 4th ed. vol. ii. p. 105.

"Seisin" in the feudal sense only means possession of such an estate in land as was anciently thought worthy to be held by a free man—Williams on Seisin, p. 2—and seisin was completed by investiture; some act of recognition by the lord was necessary before the person coming in could be deemed his tenant—Co. Litt. 266b, note 1—and a man who died tenant of such an estate was said to die "seised."

(1) (1821) 5 Madd. 282.
(2) (1836) 5 Ad. & E. 291.
(3) (1822) 5 B. & Al. 604.
(4) (1834) 5 B. & Ad. 1065.
(5) (1874) L. R. 10 Ch. 22.

The importance of tenure as distinguished from seisin is shewn in cases of replevin, where the lord had to avow upon his real tenant: Gilbert on Distress, pp. 152, 154, the point there being whether the person died tenant, not whether he died seised: 14 Viner's Abridgment, p. 301. [Watkins on Copyholds, 4th ed. vol. ii. pp. 104, 135, *Butler* v. *Archer* (1), *Fawcet* v. *Lowther* (2), and Gilbert on Tenures, pp. 62, 63, and 67, were also cited.]

Actual possession means possession in fact, as distinguished from possession in law: *Murray* v. *Thorniley*. (3) There must be actual possession or receipt of the rents and profits; the mere execution of a conveyance is not enough: *Orme's Case*. (4)

The mortgagor has something more than a mere equity of redemption; there is a distinction between the ownership of a mortgagor and that of a mortgagee. On the death of a mortgagor or on an alienation by him the estate passes just as if he were still legal owner, whereas the ownership of a mortgagee before foreclosure is nothing more than a chattel, interest, or pledge which passes to his legal personal representatives; the mortgagor, therefore, has enough to support the feudal seisin, and he remained in possession here, that is, "seised" according to the rules of tenure before the statute of "Quia Emptores," and therefore the lord was entitled to claim from him this heriot.

Jessel, K.C., in reply.

Cur. adv. vult.

May 16. COZENS-HARDY M.R. This appeal raises the question whether the plaintiff, as lord of the manor of Ewhurst, was entitled to a heriot on the death in March, 1905, of one Richard Hoper. The defendants are his executors. Richard Hoper became in 1863 the owner in fee of certain ancient freehold tenements held of the lord of the manor. The material allegations in the statement of claim are as follows: [His Lordship read them as set out above and continued:—] The defendants by their defence deny that Hoper died seised of the tenement or any part of it. By a deed dated November 1, 1887, operating not under the Statute of Uses, but as a statutory

(1) (1594) Owen's Rep. 152.
(2) (1751) 2 Ves. Sen. 300.
(3) (1846) 2 C. B. 217.
(4) (1872) L. R. 8 C. P. 281.

C. A. 1908 COPESTAKE v. HOPER. Cozens-Hardy M.R.

assurance, Hoper conveyed the property to one Browell in fee simple by way of mortgage. That mortgage is still outstanding and undischarged. The mortgagor, Hoper, remained in possession until his death. Kekewich J. held that the lord was entitled to a heriot on Hoper's death. With great respect, I am unable to agree with this decision.

We have had a long and elaborate argument, but in the view which I take of the case it is not necessary to go over much of the ground covered by the argument. We are dealing here with a right the origin of which must be found many centuries ago. It is a claim by the lord in respect of the tenancy of land held of the manor. Now, after the statute "Quia Emptores," every tenant in fee simple had a right to alienate, and the feudal relation between the lord and the alienor necessarily ceased on alienation. This sufficiently appears from the language of the statute "Quia Emptores" (18 Edw. I. st. 1, c. 1): "It shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before." It is not alleged that any particular form of alienation is requisite according to the custom of the manor, still less is it alleged that the consent of the lord, or notice to the lord, is required. Alienation has been effected from time to time in different ways—sometimes by feoffment with livery of seisin; sometimes by conveyance under the Statute of Uses; sometimes by lease and release; sometimes by a statutory conveyance taking effect not under the Statute of Uses, but under the provisions of the Real Property Act, 1845. In whatever form the alienation takes place, nothing whatever is left in the alienor. I cannot doubt for one moment that the statutory conveyance of November, 1887, passed the legal fee. It is clear that two persons cannot be seised of the land at the same moment, and I cannot appreciate the argument that the alienor, while retaining no estate or interest in the land, has some scintilla juris sufficient to support an alleged seisin. Unless, therefore, a distinction can be drawn between an absolute conveyance to a purchaser and a conveyance by way of mortgage, it seems to me that the lord cannot assert with truth

that Hoper died seised within the meaning of the custom pleaded, or that Hoper was a tenant of the manor at his death. But the custom relied upon arose at a time when the distinction between legal and equitable estates had not been recognized. The only estates which were then recognized were legal estates, and the idea of seisin, apart from a legal estate, was unknown. I think it would be wholly unreasonable to apply to the custom the comparatively modern doctrine as to the equity of redemption remaining in the mortgagor being an estate in land. There are many cases in which equity follows the law, but this is not such a case. It is plain that in the case of copyhold, a trustee is liable to the fines, fees, and other incidents of tenure, and not the beneficiary for whom he is a trustee. The rights of the lord, whether of freeholds or of copyholds held of the manor, must be asserted against, and only against, a person who is, in the view of the common law, the tenant of the lord. If a mortgagee of copyholds by conditional surrender is admitted under the surrender, he thereupon becomes the lord's tenant. Precisely the same consequence follows if a mortgagee of freeholds takes a mortgage in fee which does not require the consent of the lord, but which constitutes him tenant of the manor. There cannot be two persons at the same moment tenant of the same tenement. Browell was, and Hoper was not, tenant at the date of Hoper's death. For these reasons I think the appeal must be allowed, with the usual consequences.

Buckley L.J. The argument of this case has evoked an interesting discussion of some points of antiquarian law. The point for decision, however, lies within a small compass, and is not, I think, difficult of determination. In 1863, Richard Hoper became owner in fee of certain freehold tenements held of the lord of the manor of Ewhurst. On November 1, 1887, he executed a mortgage in fee of these premises to one Browell. The deed took effect, not under the Statute of Uses, but as a statutory conveyance under the Real Property Act, 1845 (8 and 9 Vict. c. 106). Hoper died on March 26, 1905. The mortgagee never took possession. The whole question is whether on Hoper's death he was "solely seised" of these freehold tenements. We

C. A. 1908 COPESTAKE v. HOPER. Buckley L.J.

are not here concerned with particular estates or with an estate held in coparcenary. The seisin of the whole fee must be in one person, and one only. The respondent says that, while it cannot be disputed that the whole fee simple passed in law from Hoper to Browell, the seisin nevertheless remained in Hoper. In my opinion this is impossible. Even under the old law the seisin of an estate of freehold, not being an estate in possession, passed by grant without livery of seisin, and after the statute 4 Anne, c. 16, s. 9, no attornment by the tenant was required: *Doe* v. *Cole*. (1) To a grantee of a reversionary estate it was impossible to make livery of seisin in the sense of giving physical possession, but on the death of the reversioner a heriot was due from him equally as on that of a person in possession, for the reversioner was equally in the seisin of the fee. Livery of seisin in the sense of physical delivery of possession was never necessary to pass the seisin except in a case in which the estate created was an estate in possession. But the respondent contends that under the new law, notwithstanding that all corporeal hereditaments are, as regards the conveyance of the immediate freehold, to be deemed to lie in grant as well as in livery, the seisin, as regards an estate in possession, cannot pass simply by the execution and delivery of the deed of conveyance. In my opinion the contention cannot be sustained. When Hoper executed to Browell the conveyance he unquestionably passed to Browell the whole estate at law. There remained in Hoper only such rights as exist in a mortgagor who has executed a mortgage in fee simple. The seisin, which is the possession of the estate of freehold, passed, I think, by the execution and delivery of the deed to Browell, in whom the whole estate became vested at law.

Mr. Ingpen has argued that some act of acceptance or recognition by the lord was necessary. In a case of disseisin it is no doubt material whether the lord has or has not recognized the disseisor as tenant. The reason is plain. The disseisor, by wrongfully getting possession of the land, has become wrongfully entitled to an estate in fee simple and to no less estate. If the lord recognizes him as tenant, the lord is affirming that the

(1) 7 B. & C. 243.

squatter's wrongful title is rightful. There is no such question in the case of mortgagor and mortgagee. The mortgagee's estate is not wrongful, but is created by the act of the mortgagor. The mortgagee is not a disseisor, but is a person who, by a deed which under the statute of "Quia Emptores" binds the lord, has become entitled to be tenant. The lord has no power to choose between accepting and rejecting him. The grantee becomes tenant because the tenement has, by a deed rightfully executed according to the law of the tenure, been vested in him as tenant. For these reasons I am of opinion that Richard Hoper at his death was not seised, that no heriot was demandable on his death, and that this appeal should be allowed and the action dismissed with costs.

KENNEDY L.J. In this case Kekewich J. held that Richard Hoper, a mortgagor in possession of a freehold tenement known as "Capons," within the manor of Ewhurst, was so "seised" of that tenement that on his death the lord of the manor, the plaintiff in this action, was entitled to claim his best beast as a heriot, pursuant to the custom of the manor. The mortgage was constituted by an indenture of statutory mortgage, whereby Richard Hoper conveyed the tenement to Henry Herbert Browell in fee simple, and was unredeemed at the death of Richard Hoper. According to the custom of the manor, the plaintiff's right to the heriot depended upon proof that Richard Hoper died "seised" of the freehold tenement. The learned judge held that such seisin existed, the equitable estate of the mortgagor in possession being, in his opinion, sufficient to constitute him a person "seised" of the tenement within the meaning of the custom.

With great respect to the learned judge, I cannot adopt this view. The judgments of the Master of the Rolls and of Buckley L.J., which I have had an opportunity of considering, and in which I entirely concur, have dealt so fully with the question that I desire to add only a few words of my own. It appears to me that "seisin," in relation to the manorial custom, depends upon legal and not upon equitable estate. The idea of seisin, in my understanding of legal history, cannot be divorced from

C. A. 1908 COPESTAKE v. HOPER. Kennedy L.J.

the element of legal title. The possession of the mortgagor, whether it be regarded as "at the will" or "by the sufferance" or "permission" of the mortgagor—see per Lord Selborne L. C. in *Heath* v. *Pugh* (1)—may be determined at the pleasure of the mortgagee, because, by virtue of the conveyance to him, the mortgagee has become solely possessed of the legal ownership. The learned arguments of the respondent's counsel have wholly failed to satisfy me that a mortgagor who, however great may be the value of the rights with which, in comparatively modern times, the Courts of Equity and legislation have clothed him, has neither legal title nor more than this precarious kind of possessory enjoyment can properly be treated as "seised of the freehold tenement" within the meaning of the ancient manorial custom which we have had in this case to consider.

Solicitors: *Cooper, Turner & Evans, for J. F. A. Cotching, Horsham; Hunt, Currey, Nicholson & Co.*

W. C. D.

SWINFEN EADY J. 1908 *May* 1.

BARKER *v.* ILLINGWORTH.

[1908 B. 1699.]

Mortgage—Power of Sale—Notice requiring Payment—Default for Three Months—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 20.

A notice served by a mortgagee upon a mortgagor, after the mortgage money has become payable, requiring payment at the expiration of three months from the date of the notice, is a good notice under s. 20 of the Conveyancing Act, 1881. The three months' default in payment mentioned in that section begins to run from the service of such a notice, not from the date fixed by the notice for payment.

Selwyn v. *Garfit*, (1888) 38 Ch. D. 273, distinguished.

By a deed dated April 12, 1906, an existing mortgage for 2800*l.* upon certain freehold lands belonging to the plaintiff was transferred to the defendants, and a further advance of 300*l.* made by the defendants to the plaintiff was charged on the same lands. The plaintiff covenanted to pay the whole principal sum of 3100*l.*, with interest at 4 per cent., to the

(1) 6 Q. B. D. 359.

defendants on October 12, 1906. The money was not paid when it became due under the covenant, and on January 7, 1908, the defendants' solicitor sent to the plaintiff a notice in the following terms: "As solicitor acting for the mortgagees I hereby require you to pay at the expiration of three calendar months from the date of this notice the principal sum of 3100*l.* secured by an indenture dated April 12, 1906, and all interest thereon. And I hereby give you notice that if you make default in such payment the defendants will proceed to sell the hereditaments and premises comprised in the said indenture in pursuance of the power given to them for that purpose by the Conveyancing and Law of Property Act, 1881, or by the same indenture."

The money was not paid on or before April 7, 1908, on which day the three calendar months mentioned in the notice expired. On April 9 the defendants advertised the property comprised in the mortgage for sale by auction on May 1. The plaintiff brought this action for an injunction restraining the defendants from selling, on the ground that there was no default in payment of the principal until the day fixed by the notice for payment, and that the power of sale given to the defendants by the Conveyancing and Law of Property Act, 1881, could not be exercised until the expiration of three months from that date, namely, July 7, 1908. (1)

Ashton Cross, for the plaintiff. The notice given by the defendants fixes a time for payment. There can be no default in payment until that time arrives. The case is covered by *Selwyn* v. *Garfit*. (2) The judgment of Kay L.J. in that case

(1) The Conveyancing and Law of Property Act, 1881, provides:—

Sect. 19: "(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers . . . . (i.) a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof . . . ."

Sect. 20: "A mortgagee shall not exercise the power of sale conferred by this Act unless and until—(i.) notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service."

(2) 38 Ch. D. 273.

SWINFEN EADY J.
1908
BARKER v. ILLINGWORTH.

shews that notice requiring payment means primarily notice requiring payment at once. If the mortgagees give a notice fixing a future date for payment, they have themselves postponed the time at which default begins. The statement in the notice, that the mortgagees will at the end of three months proceed to sell under the power given them by the Act, was misleading, for the plaintiff would naturally understand that he would have three months from the time fixed by the notice.

A. J. Allen, for the defendants. The Conveyancing Act, by s. 19, gives an absolute power of sale when the money has become due. Then s. 20 prohibits the exercise of the power until notice has been served requiring payment and default made for three months after such service, not after the time fixed by the notice for payment. In *Selwyn* v. *Garfit* (1) the notice required payment before the money had become due, when no power had arisen. That is quite different from this case.

Ashton Cross in reply.

SWINFEN EADY J. This is a short point, but no doubt it is important, because it raises a question on the construction of a statute under which transactions are daily taking place. The facts are not in dispute. There was a mortgage deed dated April 12, 1906, containing a covenant to pay the principal money at the end of six months, so that the money became due on October 12. The power of sale relied on by the mortgagees is the statutory power. On January 7, 1908, a notice was given by the defendants to the plaintiff requiring payment at the expiration of three months, and stating that if default was made in payment the mortgagees would proceed to sell under the power given to them by the Act. According to s. 19 of the Conveyancing Act, 1881, where the mortgage is by deed, as it is here, the mortgagee has power to sell when the mortgage money is due. It is due in this case, and if that were all the mortgagee would clearly have an immediate power of sale. But that power, if subsisting, is regulated and restricted by s. 20, which provides that it shall not be exercised until notice requiring payment of the mortgage money has been served on

(1) 38 Ch. D. 273.

the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service. It is contended by the mortgagor that no default can arise until the date fixed for payment by the notice requiring such payment, and the three months must run from that date. So that, the date fixed for payment by the notice being April 7, 1908, the power of sale cannot be exercised until July 7. The mortgagees point out that the words of the statute are not three months from the time fixed for payment by the notice, but three months from the service of the notice, and they contend that the default in payment commenced when the money became due according to the tenor of the mortgage deed. In my opinion the mortgagees' contention is well-founded. The power of sale arises when default has been made in payment according to the tenor of the deed. Sect. 20 of the Act does not confer the power of sale, but regulates and restricts the power already given by s. 19. That power arises when the money becomes due and is not paid according to the provisions of the deed. Sect. 20 only applies when this default has occurred. It requires by way of conditions precedent to the exercise of the power that notice should be given requiring payment—that has been done—and that there should be default in payment for three months after such service. In my opinion there has been such default. There is nothing misleading about the notice, for it states that if the money is not paid within the three months the mortgagees will then proceed to exercise their power of sale.

In *Selwyn* v. *Garfit* (1) the mortgage was dated November 22, 1880, the covenant was to pay the principal on May 22, 1881, and there was a provision that the power of sale should not be exercised until default should have been made in the payment at the time thereinbefore appointed for payment thereof of some principal money or interest the payment whereof was intended to be thereby secured, and the mortgagees should have given notice in writing to the mortgagor to pay off the moneys for the time being owing, and default should have been made in payment of the whole or part of such moneys for three calendar

(1) 38 Ch. D. 273, 283, 284.

SWINFEN EADY J.
1908
BARKER v. ILLINGWORTH.

months from the time of giving such notice. Notice requiring repayment of the principal sum had been given on January 19, 1881, when the money was not due. The sale took place without further notice, and the property was conveyed to the purchaser on June 20, 1881, less than three months after the date fixed by the mortgage deed for payment. The sale was held to be bad because the notice was given before the money was due. It is plain from the judgments in the Court of Appeal that that was the ground of the decision. Cotton L.J. said: "I think that there is no such notice and default as the proviso required; the default could not begin till the expiration of the six months from the date of the mortgage"; and Lindley L.J. said: "It is plain that under this power there could be no sale until three months had passed after default was made in payment of the money, and there could be no default until the expiration of six months from the date of the mortgage." He is obviously referring to the date fixed by the mortgage deed for payment of the money. That decision, therefore, has no application to this case. I am of opinion that the defendants are now entitled to exercise their power of sale. The plaintiff's motion fails.

Solicitors: *Helliwell, Harby & Evershed, for Ison & Hollings, Leeds; Radford & Frankland, for C. M. Wilson, Bradford.*

J. R. B.

In re BERKHAMSTED GRAMMAR SCHOOL.

WARRINGTON J.

1908

April 2, 3.

[1907 B. 059.]

Endowed School—Grammar School—Scheme of Endowed Schools Commissioners—Alteration of—Jurisdiction of Board of Education—Due regard to Educational Interests of Privileged Class—Public Notice—Notice to Councils of Parishes affected—Modification of Draft Scheme—Necessity for further Notice—Discretion of Board of Education—Charitable Trusts Act, 1860 (23 & 24 *Vict. c.* 136), *s.* 6—*Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *ss.* 11, 28, 45—*Charitable Trusts Act*, 1869 (32 & 33 *Vict. c.* 110), *s.* 7—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 14, *sub-s.* 5—*Board of Education Act*, 1899 (62 & 63 *Vict. c.* 33)—*Board of Education (Powers) Orders in Council*, 1900-1902.

The B. Grammar School was an ancient foundation and had been regulated from time to time by schemes settled by the Court of Chancery which conferred certain educational privileges on the inhabitants of the parishes of B. and N.

In 1877 the Endowed Schools Commissioners made a scheme for the regulation of the school which as altered by a scheme made in 1903 by the Board of Education, who had succeeded to the powers of the Charity Commissioners, preserved the educational privileges of the inhabitants by providing that the tuition fees should in the case of boys whose parents were resident in one or other of the parishes of B. and N. be reduced by one-third.

In 1905 the Board of Education, under s. 6 of the Charitable Trusts Act, 1860, gave public notice of a proposal by them to make a new scheme, and under s. 14, sub-s. 5, of the Local Government Act, 1894, sent a draft of the proposed scheme to the parish councils of B. and N. The draft scheme preserved the privilege of the inhabitants of B. and N. to a remission of one-third of the tuition fees, but made it a condition that the parents to be entitled to receive it must have resided seven years in one or other of the parishes. The scheme was objected to by the parish councils and by the governors of the school, and for a time remained in abeyance.

In 1907, without giving any further notice either under the Charitable Trusts Act, 1860, or the Local Government Act, 1894, the Board sealed a modified scheme. The scheme as modified abolished the privilege of the inhabitants of B. and N. to a remission of one-third of the tuition fees, but substituted therefor (1.) a provision giving a preference as to admission to the school to the children of the inhabitants of B. and N. over other children, and (2.) a provision that a yearly sum of not less than 100*l.* nor more than 200*l.* should be applied in establishing bursaries, tenable at the school by boys whose parents or guardians were resident

WARRINGTON J.

1908

BERKHAMSTED GRAMMAR SCHOOL, *In re.*

in the parishes of B. and N., and who were, in the opinion of the governors, in need of assistance to enable them to continue to attend the school:—

Held, (1.) that the Board had jurisdiction under s. 28 of the Endowed Schools Act, 1869, to alter the scheme of 1877 in the manner provided by the scheme of 1907; (2.) that in making the scheme of 1907 the Board had had "due regard" to the educational interests of the inhabitants of B. and N. within s. 11 of the Endowed Schools Act, 1869; (3.) that the Board, having given public notice as required by s. 6 of the Charitable Trusts Act, 1860, of the draft scheme of 1905, had an absolute discretion to determine whether or not the modifications introduced into the scheme of 1907 were such as to render a fresh notice desirable; and (4) that the Board, having given to the parish councils the notice required by s. 14, sub-s. 5, of the Local Government Act, 1894, were under no obligation to give them a further notice of the modified scheme.

Semble, the directions as to notice in s. 14, sub-s. 5, of the Local Government Act, 1894, are merely directory, and in no way affect the jurisdiction of the Board to make a scheme.

PETITION under s. 8 of the Charitable Trusts Act, 1860, by certain persons who were inhabitants of, and resident ratepayers in, the ancient parishes of Berkhamsted and Northchurch, in the county of Hertford, praying that a scheme for the regulation and management of the foundation of the Berkhamsted Grammar School, which had been sealed by the Board of Education on March 13, 1907, might be rescinded, altered, or amended in the manner suggested by the petition, or in such further or other respect as to the Court should seem meet.

The case put forward by the petitioners, as appearing by their petition, was shortly as follows:—

The Berkhamsted Grammar School was founded by Dr. Incent, Dean of St. Paul's, pursuant to letters patent granted by King Henry VIII. in 1541, as a free grammar school within the town of Berkhamsted, and refounded in 1549 by an Act of Parliament passed in 2 & 3 Edw. 6. The Act provided for teaching the children to the number of 144, without taking any stipend for teaching them, and that the school should thenceforth be called "The Free Grammar School of King Edward VI. in Berkhamsted."

In 1865, a petition having been presented to the Court of Chancery, by which it was (inter alia) proposed that parents, being inhabitants of the town of Berkhamsted or Northchurch, should pay a fee of 3*l.* 3*s.* in respect of each boy attending the

school, Page Wood V.-C. decided to introduce a number, not exceeding fifty, of the local children who should be free, and to provide that, if ever they should exceed fifty, those living in the town should not pay more than 3*l.* 3*s.*, and then to let the governors, if they pleased, elect foundation scholars not exceeding 144. (1)

By a scheme for the administration of the foundation, framed under the Endowed Schools Acts and approved by Her late Majesty in Council on October 23, 1877 (hereinafter referred to as the scheme of 1877), it was provided by clause 42 that all boys, except as thereinafter provided, should pay tuition fees at the rate of not less than 6*l.* nor more than 12*l.* a year, except that in the case of any boy whose parent was for the time being resident in either of the parishes of Great Berkhamsted or Northchurch the tuition fee should be reduced by one-third, and by clause 54 it was provided—pursuant to s. 11 of the Endowed Schools Act, 1869, by way of having regard to the educational interests of the particular class of persons, the inhabitants of Great Berkhamsted and Northchurch—that one-half the free scholars should be day scholars. By clause 72 it was provided that the Charity Commissioners might from time to time in the exercise of their ordinary jurisdiction frame schemes for the alteration of any portions of that scheme, provided that such schemes were not inconsistent with anything contained in the Endowed Schools Acts, 1869, 1873, and 1874. The latter clause was inserted pursuant to s. 28 of the Endowed Schools Act, 1869.

The scheme of 1877 was amended by schemes made on May 13, 1887, August 13, 1895, and November 4, 1901, and was altered by schemes of January 17, 1888, November 11, 1890, and January 8, 1903, but none of those amendments or alterations diminished the privileges and educational advantages which were preserved to the inhabitants of Berkhamsted and Northchurch by the scheme of 1877.

On December 7, 1905, the Board of Education, who, under the Board of Education Act, 1899, and the Board of Education (Powers) Orders in Council, 1900 to 1902, had succeeded to the

(1) *Berkhampstead School Case*, (1865) L. R. 1 Eq. 102.

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

powers of the Charity Commissioners, pursuant to clause 72 of the scheme of 1877, and in the exercise of their ordinary jurisdiction under the Charitable Trusts Acts and Board of Education Act, 1899, gave public notice of a proposal to establish a scheme further altering the scheme of 1877, and forwarded a draft of the proposed scheme to the parish council of each of the parishes of Northchurch and Berkhamsted Rural as well as to the council of the urban district of Berkhamsted. The draft scheme proposed to diminish the privileges preserved to the inhabitants of Berkhamsted and Northchurch by the existing scheme, but on the other hand contained in clause 4 thereof express provisions, which it was proposed to include under clause 51 of the scheme, that "(1.) Any boy, whose parent at the date of this scheme is and has been for not less than seven years, and continues to be up to the date of the application for admission, a resident and ratepayer in one of the Ancient Parishes, shall, so long as the parent remains a resident and ratepayer, pay a tuition fee of only 6*l.*; (2) Any boy, whose parent shall have been for not less than seven years immediately prior to the application for admission a resident and ratepayer in one of the Ancient Parishes, shall, so long as the parent remains a resident and ratepayer, pay tuition fees at the rate of two-thirds of the tuition fees fixed as aforesaid." The ancient parishes therein referred to were the parishes of Berkhamsted and Northchurch.

Objections were raised by the Berkhamsted Urban District Council, the Berkhamsted Rural Parish Council, and the Northchurch Parish Council (being all the local authorities interested in the area of the ancient parishes) to the proposed scheme as being prejudicial to the rights of the inhabitants of Berkhamsted and Northchurch and their boys, but no public inquiry was held for the purpose of dealing with such objections, and the governors of the said school desired that the scheme should not be proceeded with, and none of the said local authorities interested in the scheme were further consulted or received any further notice with reference to the scheme, and the petitioners, as they alleged, understood that it had been abandoned.

On April 5, 1907, the local authorities received a print of a scheme which had been sealed by the Board of Education on

March 13, 1907, which, so far as material, provided as follows for the further alteration of the scheme of 1877.

"*To Whom School is Open.*

"6.—To clause 47 of the scheme the following sentence is added at the end of the clause:—

'If there is not room for all boys found fit for admission as herein provided, preference shall be given to such of them as are children of inhabitants of the Ancient Parishes, provided that, if the Governors think fit, a first preference may be given to the extent of 30 places to boys nominated by the Hertfordshire County Council.'

"*Tuition and Boarding Fees.*

"7.—For clause 51 of the scheme the following clause is substituted:—

'51. All boys, including boarders, except as herein provided, shall pay tuition fees (covering all subjects of instruction given in the school during school hours except instrumental music), to be fixed from time to time by the Governors, at the rate of not less than 6*l.* nor more than 12*l.* a year for any boy. Except as herein provided, no difference in respect of tuition fees shall be made between any scholars on account of place of birth or residence, or of their being or not being boarders. The payments of boarders apart from tuition fees shall be at the rate of not more than 50*l.* a year in a Hostel of the Foundation, nor more than 60*l.* a year in a Master's house for any boy. No extra or additional payment of any kind shall be allowed without the sanction of the Governors and consent in writing on behalf of the scholar concerned. All payments for tuition fees shall be made in advance to the Head Master, or to such other person as the Governors may from time to time appoint, and shall be accounted for by the person receiving them to the Governors, and be treated by them as part of the general income of the Foundation.'"

"*Town Bursaries.*

"11.—Between clauses 58 and 59 of the scheme the following clause is inserted:

'58A. A yearly sum of not less than 100*l.* nor more than

WARRINGTON J.

1908

BERKHAMSTED GRAMMAR SCHOOL, *In re.*

200*l.* shall be applied in maintaining Bursaries, to be called Town Bursaries, tenable at the School by boys, whose parents or guardians are resident in the Ancient Parishes, and who in the opinion of the Governors are in need of assistance to enable them to attend or continue to attend the School. The Governors may make regulations from time to time for determining the number, value, and period of tenure, of the Town Bursaries, provided that no such Bursary shall exceed the annual value of 10*l.*, or be awarded to any scholar already in the School, unless the Head Master reports in writing, that he is deserving of it by reason of character and good conduct.

'Subject as herein provided the Town Bursaries shall be awarded and held under the general conditions hereinafter prescribed as regards Scholarships and Exhibitions.'"

On perusing such scheme it was found, as the petitioners alleged, that the said express provisions intended to be numbered 51 (1.), 51 (2.), which were included in the draft scheme, had been struck out; that the privilege of Berkhamsted and Northchurch boys of having a reduction of one-third of the tuition fees which they had enjoyed under the scheme of 1877, as last altered on January 8, 1903, and which would have been to a large extent preserved by the said proposed provisions 51 (1.) and 51 (2.), had been totally abolished; and that the only provision which appeared to have been substituted therefor was a provision of a yearly sum of not less than 100*l.* nor more than 200*l.* to be applied in town bursaries tenable by boys whose parents or guardians were resident in the ancient parishes, and who in the opinion of the governors were in need of assistance to enable them to attend the school. Such a provision, the petitioners alleged did not exceed one-fifth of the sum represented by the one-third reduction in fees calculated on the number of Berkhamsted and Northchurch boys now in the school, and was, they submitted, in no way a fair substitute for the pre-existing right, and was objectionable as involving an allegation of poverty by the parent and differentiation of the boy as being a charity scholar.

The petitioners alleged that the inhabitants in general of Berkhamsted and Northchurch and the three local bodies interested in the question—i.e., the Berkhamsted Urban District

Council and the parish councils of Berkhamsted Rural and Northchurch—had no knowledge or information as to the terms of the scheme as sealed on March 13, 1907, other than what they derived from the said draft scheme forwarded to them, until after the scheme was actually sealed, and that no draft of the scheme as altered and sealed was ever communicated to the council of the parish of Berkhamsted Rural or to the council of the rural parish of Northchurch pursuant to the provisions of s. 14, sub-s. 5, of the Local Government Act, 1894.

On April 15, 1907, the Berkhamsted Rural Parish Council unanimously passed the following resolutions, which were unanimously confirmed at a parish meeting specially convened to consider the question on April 22, 1907, and the Northchurch Parish Council duly passed the resolutions in the same terms on April 30, 1907, viz.:—

"(1.) This Council desires to enter its protest against the sealing by the Board of Education of the scheme dated 13th March, 1907, without notice to or communication with this Council respecting material and substantial alterations from the Board's Draft Scheme of December, 1905, which seriously affect the privileges reserved to residents in Berkhamsted and Northchurch by the scheme of 23rd October, 1877, for the administration of the Foundation known as the Free Grammar School of King Edward VI. in Berkhamsted, founded by Dean Incent.

"(2.) That a petition be forthwith presented to the Board of Education, praying the Board to discharge so much of the scheme of 13th March, 1907, as deprives such residents of their said privileges so reserved to them."

Pursuant to these resolutions a petition setting forth the facts above stated was signed by the chairman of each of the parish councils and was forwarded to the Board of Education on May 2, 1907. The petitions were supported by 1058 resident ratepayers in the district, whilst only a small number had expressed an opinion adverse thereto. In the petition the petitioners submitted to the Board of Education:

(*a*) That the privileges of which the resident ratepayers of Berkhamsted and Northchurch had been deprived as aforesaid formed for over 300 years a fundamental part of the constitution

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

of the said school, and that the abolition of these privileges was not a mere modification of a scheme regulating the school, but was an alteration of a substantial and essential part of the constitution, of which notice should have been given.

(*b*) That the said privileges having been preserved pursuant to s. 11 of the Endowed Schools Act, 1869, by way of having due regard to the educational interests of the inhabitants of Great Berkhamsted and Northchurch, the abolition of those privileges was inconsistent with s. 11 of the Endowed Schools Act, 1869, and was therefore an alteration which could not properly be made under clause 72 of the scheme of October 23, 1877.

(*c*) That the Board of Education having given express notice to a privileged class, namely, the ratepayers who had resided or might reside seven years in the ancient parishes, and to their representatives, that their privileges were by the proposed order to be preserved, it was not in conformity with the Charitable Trusts Acts, and in particular with s. 6 of the Charitable Trusts Act, 1860, to abolish those privileges without further notice, nor was such abolition a modification of the draft order within the meaning of the said section, or of s. 7 of the Charitable Trusts Act, 1869.

And the petitioners prayed that the Board would make an order pursuant to s. 8 of the Charitable Trusts Act, 1869, discharging so much of the order of March 13, 1907, establishing the scheme sealed on that date as deprived the inhabitants of Berkhamsted and Northchurch of the privileges preserved to them under the scheme of January 8, 1903.

The Board of Education on May 23, 1907, refused to accede to the petition or to discharge any portion of the order of March 13, 1907.

The present petitioners complained of the order establishing the scheme sealed on March 13, 1907, in the following respects:—

(*a*) It deprived them and the other inhabitants resident in one of the ancient parishes of the principal part of the privileges and educational advantages which the scheme of 1877 preserved to them, pursuant to s. 11 of the Endowed Schools Act, 1869, having due regard to the educational interests of such inhabitants as a class.

(*b*) It abolished the last remnant of the privileges which, in accordance with the intention of the founders, characterized the foundation as being the Free Grammar School of Berkhamsted, and were preserved by the decision of the Court of Chancery in the year 1865. (1)

(*c*) It deprived the petitioners and other resident ratepayers in the ancient parishes, without any notice, of that portion of those privileges which, according to the express notice given to them as a class by the Board of Education, they were entitled to think would be preserved.

(*d*) It substituted for those privileges a provision which was inadequate in amount and did not have due regard to the educational interests of the inhabitants of the ancient parishes as a class.

The petitioners appealed from the order establishing the scheme sealed on March 13, 1907, on the following grounds: On each of the grounds set out in the above-mentioned petition to the Board of Trade and on the ground that no draft of the scheme relating to the charity which was sealed on March 13, 1907, within the meaning of s. 14, sub-s. 5, of the Local Government Act, 1894, was communicated to the council of either of the rural parishes which were affected by the scheme in accordance with that sub-section.

The leave of the Attorney-General to present this petition had been duly obtained.

Cave, K.C. and *G. M. Edwardes Jones*, for the petition. The petitioners object to the scheme of 1907 for the following reasons:— 1. The scheme is ultra vires the Board of Education. Clause 42 of the scheme of 1877, entitling the inhabitants of Berkhamsted and Northchurch to the privilege of a reduction of one-third of the tuition fees, was made statutory by s. 45 of the Endowed Schools Act, 1869 (2), and the Board of Education had therefore no jurisdiction to abolish that privilege. Sect. 28 of that Act,

(1) *Berkhampstead School Case*, L. R. 1 Eq. 102.

(2) The Endowed Schools Act, 1869, provides:—

Sect. 11: "It shall be the duty of the Commissioners in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, and that whether as

WARRINGTON J.

1908

BERKHAMSTED GRAMMAR SCHOOL, *In re.*

which empowers the Board to alter a scheme in the exercise of their ordinary jurisdiction, applies only to the alteration of the machinery of a scheme, and does not extend to the alteration of a provision which is made part of the Act itself.

[WARRINGTON J. The whole of the scheme of 1877 is statutory.]

That is so, but the Board are empowered to alter it in non-essential particulars. The alteration which they have made in the scheme of 1907 is in excess of their jurisdiction.

[WARRINGTON J. Where do you draw the line?]

Between essentials and non-essentials. The Board have the same jurisdiction as to making and altering schemes as the Court has, and their powers are limited in the same way as those of the Court are. They have no power to take away rights conferred on a class of persons by Act of Parliament: *Attorney-General* v. *Governors of Christ's Hospital* (1); Tudor's Charitable Trusts, 4th ed. p. 186. To hold that they are so entitled would be to give to the Board under s. 28 of the Act of 1869 a power to repeal Acts of Parliament which is only conferred on the Endowed Schools Commissioners by s. 46 of that Act. The intention of the Act was that schemes which involved the amendment or abrogation of Acts of Parliament should be made by the Endowed Schools Commissioners under that Act, but that minor alterations in the scheme might be made by the Charity Commissioners in the exercise of their ordinary jurisdiction.

2. The Board have not in making the scheme had "due regard" to the educational interests of the inhabitants as they

---

inhabitants of a particular area or otherwise, to have due regard to the educational interests of such class of persons."

Sect. 28: "In any scheme the Commissioners may provide for the alteration from time to time of such portions of the scheme as they think expedient by the Charity Commissioners for England and Wales in the exercise of their ordinary jurisdiction, provided such alteration shall not be contrary to anything contained in this Act."

Sect. 45: "A scheme shall not of itself have any operation, but the same, when and as approved by Her Majesty in Council, shall from the date specified in the scheme, or, if no date is specified, from the date of the order in council, have full operation and effect in the same manner as if it had been enacted in this Act."

(1) [1896] 1 Ch. 879, 888.

are required to have by s. 11 of the Endowed Schools Act, 1869. (1) They must make some specific provision for the class of persons whose privileges or educational interests are affected by the scheme so that the class may claim it as a matter of right. Here provision is made only for a portion of the class, namely, those who are in need of assistance. In *In re Hodgson's School* (2) the Court remitted a scheme to the Charity Commissioners on the ground that no sufficient provision had been made therein to satisfy the existing educational interests according to the requirements of s. 11.

3. No public notice was given of the scheme of 1907, as required by s. 6 of the Charitable Trusts Act, 1860. (3) The draft scheme of 1905 contained the educational provisions, of the absence of which in the present scheme the petitioners now complain. In striking them out of the scheme of 1907 without further public notice the Board exceeded their powers of modifying the existing scheme. No objections were made to the draft scheme of 1905 which could have led to the alterations made in the scheme of 1907. Such alterations were not modifications of the scheme within s. 6 of the Charitable Trusts Act, 1860, but the scheme embodying them was in fact a new scheme of which a fresh public notice under the section should have been given.

[WARRINGTON J. Have I any power to annul the scheme?]

Under s. 8 of the Charitable Trusts Act, 1860, the Court has

(1) See note 2, p. 33, *ante*.

(2) (1878) 3 App. Cas. 857.

(3) The Charitable Trusts Act, 1860, s. 6, provides: "No order . . . . establishing a scheme for the administration of any charity, shall be made by the said board before the expiration of one calendar month after public notice of the proposal to make such order shall have been given, as they may consider most expedient and effectual for ensuring the publicity thereof, in each parish or district in which the charity, if of a local character, shall be applicable, or among all persons interested therein; . . . . and every notice hereby required shall contain (so far as conveniently may be) sufficient particulars of the objects of the proposed order, and shall prescribe a reasonable time within which any objections thereto or suggestions thereon may be made or transmitted to the board; and the said board shall receive and consider all such objections and suggestions, and may withhold, suspend, or modify their proposed order, as they shall thereupon, or in the result of further inquiry, or otherwise, think expedient."

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

power to remit or alter schemes. If the alterations in question are modifications within s. 6 of the Act they are not such as the Court will support. A privilege conferred by Act of Parliament and preserved throughout various previous schemes ought not to be abolished without notice.

4. No proper notice of the scheme as finally settled was given to the parish councils as required by s. 14, sub-s. 5, of the Local Government Act, 1894. (1) Notwithstanding s. 7 of the Charitable Trusts Act, 1869 (2), the draft scheme with the proposed modifications ought to have been submitted to the parish councils. It is, it is submitted, a condition precedent to the validity of a scheme that s. 14, sub-s. 5, of the Local Government Act, 1894, should have been complied with. There is nothing in the sub-section which incorporates the discretion given to the Board by s. 7 of the Charitable Trusts Act, 1869. The fact that the sub-section has not been complied with in this case is in itself a sufficient ground for sending back the scheme to the Board.

Vaughan Hawkins (*Sir W. S. Robson, A.-G.*, with him) for the Crown.

[WARRINGTON J. I will not trouble you on the point as to jurisdiction under s. 28, nor on the point as to "due regard," but I desire to hear you on the question whether the scheme of 1907

(1) The Local Government Act, 1894, s. 14, provides:—

Sub-s. 5. "The draft of every scheme relating to a charity, not being an ecclesiastical charity, which affects a rural parish, shall, on or before the publication of the notice of the proposal to make an order for such scheme in accordance with section 6 of the Charitable Trusts Act, 1860, be communicated to the council of the parish, and where there is no parish council to the chairman of the parish meeting, and, in the case of a council, the council may, subject to the provisions of this Act with respect to restrictions on expenditure, and to the consent of the parish meeting, either support or oppose the scheme, and shall for that purpose have the same right as any inhabitants of a place directly affected by the scheme."

(2) The Charitable Trusts Act, 1869, s. 7, provides: "Nothing in the Charitable Trusts Acts, 1853 to 1869, shall be deemed to require or to have required the board, upon modifying a proposed order in manner provided by section 6 of the Charitable Trusts Act, 1860, after the publication thereof, to give public notice of such modified order in the manner provided by that section with respect to the order originally proposed, unless they think further notice desirable."

was not in fact a fresh scheme, and whether the Board of Education ought not to have proceeded under s. 6 of the Charitable Trusts Act, 1860.]

Looking at the matter broadly, the only question is what ought to be done on this appeal. The validity of the scheme is not affected by any irregularity. By s. 8 of the Charitable Trusts Act, 1869, a scheme, until discharged by the Court or by the Board, is to be deemed to have been duly and formally made, and no objection thereto on the ground only of irregularity or informality is to be entertained.

[WARRINGTON J. That does not prevent me from entertaining an objection to it.]

No. The Court has complete jurisdiction over the whole matter. The jurisdiction in charity matters is all one jurisdiction. It is exercised in the first instance by the Board of Education, to whom a wide discretion is given as to mode of procedure. The scheme in the present case has been fully considered by the Board.

[WARRINGTON J. It may be that if I send back the scheme to the Board they will make the same scheme, but they will then have had an opportunity of hearing what the objectors have to say.]

The procedure with regard to altering schemes is contained in ss. 6 to 8 of the Charitable Trusts Act, 1860. The word "modify" in s. 6 is, it is submitted, equivalent to the word "alter."

[WARRINGTON J. I do not think there is any doubt about that. The only question is whether there was not in this case such a departure from the draft scheme in the amended scheme as to make the latter a new scheme.]

It is impossible to define the amount of alteration in a draft scheme which will make the scheme a new one, and the matter as to giving further notice is therefore left entirely in the discretion of the Board. When once public notice has been given of a proposed scheme as required by s. 6 of the Act of 1860, as amended by s. 7 of the Charitable Trusts, Act, 1869, the Board has an absolute discretion to say in any particular case whether such modification has been made in the scheme as to require a fresh notice.

WARRINGTON J. 1908 — BERKHAMSTED GRAMMAR SCHOOL, *In re.*

[WARRINGTON J. If the Board had a discretion there is an end of the matter. I cannot say that they have exercised it wrongly.]

Then, as to s. 14, sub-s. 5, of the Local Government Act, 1894. It cannot be said that the effect of non-compliance with that sub-section was to render the scheme invalid. The matter was merely one of procedure.

On the other part of the case, the Court will not interfere with the details of a scheme of the Board unless they have exceeded their authority or the scheme contains something wrong in principle or wrong in law: *In re Campden Charities* (1); *In re Hodgson's School* (2); *Attorney-General* v. *Bishop of Worcester.* (3)

Rowden, K.C., and *H. B. Vaisey*, for the Governors of the School. The governors have fully considered and support the scheme. The provisions of the scheme do not fail in having "due regard" to the educational interests of the inhabitants within the meaning of s. 11 of the Endowed Schools Act, 1869: *Ross* v. *Charity Commissioners* (4); *In re Hemsworth Grammar School and Hospital.* (5) If this had been an appeal under the Act of 1869, and the governors had been petitioners, they would have been the only persons who could have raised the question as to want of "due regard": s. 39, sub-s. 4, of the Act.

Under the Charitable Trusts Acts the alteration of an existing scheme is one process only, and the modification of any one particular is merely an incident. The Board were therefore under no obligation to republish the scheme, the matter being one which was entirely within their discretion.

Cave, K.C., in reply.

WARRINGTON J. This is a petition presented by certain inhabitants of the town of Berkhamsted under s. 8 of the Charitable Trusts Act, 1860. The petition prays that a certain scheme of the Board of Education sealed on March 13, 1907, in reference to the Berkhamsted Grammar School, may be rescinded or altered or amended in manner suggested in the petition, or

(1) (1881) 18 Ch. D. 310, 330, 333.
(2) 3 App. Cas. 857.
(3) (1851) 9 Hare, 328.
(4) (1882) 7 App. Cas. 463, 468.
(5) (1887) 12 App. Cas. 444, 451.

in such further or other respect as to the Court shall seem meet.

The facts, so far as they are material, are these: The Berkhamsted Grammar School is an ancient foundation, dating originally from the year 1523, but ultimately incorporated by an Act of 2 & 3 Edw. 6. The original foundation did not in terms create special privileges for the inhabitants of the parish or town of Berkhamsted. However, in the year 1841 a scheme was established by the Court of Chancery for the regulation of the charity, and by that scheme certain privileges were conferred upon the inhabitants of the town of Berkhamsted. The special nature of those privileges it is unnecessary for the purposes of the present application to describe. It is sufficient to say that under that scheme the inhabitants of Berkhamsted had certain privileges. That scheme of 1841 was subsequently varied by two schemes, one of which it is unnecessary to refer to, made, I think, in the year 1855, and another made in 1857, which was the subject of proceedings in this Court, reported under the name of the *Berkhampstead School Case*. (1) Under the latter scheme the privileges of the inhabitants were to some extent modified, but as modified they were preserved and re-established. In that state of things the Endowed Schools Act, 1869, to which I shall have occasion to return presently, came into operation, and under it the Endowed Schools Commissioners made a scheme, which has been referred to in this case as the scheme of 1877. That scheme was subsequently altered on four separate occasions, and ultimately, in the year 1903, the Board of Education who had succeeded to the powers of the Charity Commissioners, made a fresh scheme really making some alterations in the scheme of 1877 and in fact taking its place. In that scheme the provision for the benefit of the inhabitants of Berkhamsted was as follows—I am reading from clause 51 of the scheme—"All boys, including boarders, except as herein provided, shall pay tuition fees . . . . to be fixed from time to time by the governors at the rate of not less than 6*l.*, and not more than 12*l.* a year for any boy, except" —and this is where the privilege came in—"that in the case of any boy whose parent is for the time being resident in one of the

(1) L. R. 1 Eq. 102.

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

ancient parishes"—the ancient parishes meaning the parish of Berkhamsted and the parish of Northchurch—"the tuition fees shall be reduced by one-third. Except as aforesaid no difference in respect of tuition fees shall be made between any scholar on account of place of birth or residence or of their being or not being boarders." That was the only privilege given to the residents of the ancient parishes by the scheme of 1877. I say advisedly by the scheme of 1877, because that provision was not introduced for the first time in the scheme of 1903. That scheme in that respect only repeats the provisions of the scheme of 1877.

Under those schemes the prosperity of the school in point of numbers has enormously increased. In 1865, as appears by the report of the *Berkhampstead School Case* (1), the number of scholars was under one hundred. By the year 1905, the number of scholars had increased to over four hundred. In that year the inspector of the Board of Education made a report extremely favourable to the school, speaking in the highest terms of the education given and of its discipline and of the work of the head master and his assistants, but calling serious attention to the fact that the revenues of the endowment supplemented by the school fees were not enough to maintain the school in the state of efficiency in which it ought to be maintained, and in particular in reference to the salaries paid to the assistant masters. The Board of Education took that report into consideration, and in December, 1905, they proposed to make a new scheme, or rather an alteration in the existing scheme, and in compliance with s. 6 of the Charitable Trusts Act, 1860, they gave the notice required by that section to be given, and in compliance with s. 14, sub-s. 5, of the Local Government Act, 1894, they sent a draft of the scheme to the parish councils which were affected and to the urban district council of Berkhamsted. That draft scheme provided with reference to the privileges of the residents in a manner which I need not read in detail, but it is sufficient to describe it in this way, that it left the right to have the fees diminished by one-third, but it made it a condition that the parent or guardian of the child should have lived seven years in the

(1) L. R. 1 Eq. 102.

affected parish. That was the modification introduced by that scheme into the residential privilege. That scheme was objected to by the bodies representing the districts and was the subject of considerable discussion between the Board of Education and the governors of the school. A meeting was held in May, 1906, between the governors and representatives of the Board, as the result of which the governors expressed the view that it was better not to proceed further with the draft scheme. The Board of Education, however, after consideration, wrote a letter on June 27, 1906, to the governors, referring to the views which they had expressed, to which I have just alluded, and saying that it appeared to the Board, on a detailed review of the financial condition of the foundation, that "it is impossible to arrive in that way"—that is by dropping the then proposed scheme and by going on with the existing scheme—"at a satisfactory solution of the present difficulties." They then dealt at very considerable length with the financial condition of the school and with the way in which the difficulties might be met, and they ultimately put forward the proposal which was afterwards embodied in the scheme which is now in question.

In March, 1907, without any further notice to the local bodies affected by what was proposed, and without any further public notice (for the discussion between them and the governors was not public), the Board sealed the scheme which is now objected to. That scheme deals with the privileges of the inhabitants in two ways. It abolishes altogether the privilege of the inhabitants to have the one-third of the fees remitted, but it substitutes for that privilege two other provisions in favour of the inhabitants. The first of those provisions is expressed in clause 6. [His Lordship read the clause, and continued:—] That is one of the clauses in which they replace the privileges enjoyed by the inhabitants, namely, a preference to the children of inhabitants over other boys, subject to the provision as to the nominees of the county council. They also deal with the matter in another way by clause 11 of the scheme. [His Lordship read the clause and continued:—] It will be observed, therefore, that the pecuniary privilege given by the previous scheme to all inhabitants now takes the form of a pecuniary privilege larger in amount, or

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

which at any rate may be larger in amount, but given only to those children whose parents require assistance. It may be, and probably will be, more than enough to cover the one-third reduction, so that those who get the privilege will probably get a more valuable privilege than that which they would have had before; and not only that, but the privilege will be given to those whose parents really require the assistance. That is the nature of the scheme which is proposed, and I am asked to alter or amend or discharge that scheme for several reasons which I will refer to directly.

Before I state the reasons which have been put forward by way of appeal from the Board of Education, I desire to call attention to what was said in *In re Campden Charities* (1) as to the mode in which the Court ought to exercise the jurisdiction under s. 8 of the Charitable Trusts Act, 1860, and the considerations which ought to weigh with it or to determine the exercise of that jurisdiction. What Sir George Jessel says in that case is this (2): "This is a scheme settled by a competent authority, the Charity Commissioners, persons not only of great but of special experience in these matters, and persons intrusted with the supervision of these matters as a separate body by the Legislature for that very reason. It would not be, in my opinion, sufficient for a judge to say he thought some detail might well be different, or that if he himself had originally settled the scheme he should have put in some other arrangements than those which are specified in the scheme. He must be satisfied that the Charity Commissioners have gone wrong either by disobeying those rules of law which govern them, as well as they govern Courts of Justice, or else that there has been some slip or gross miscarriage which calls for the intervention of the Court to set aside and remodel the scheme." James L.J. in the same case says (3) that the Court "ought to be satisfied that the Commissioners have done something which they ought not to have done, having regard to the instruments creating the trust." Those are the principles which I have to observe in dealing with this case.

Now I come to the reasons which are alleged against this

(1) 18 Ch. D. 310. (2) 18 Ch. D. 330.
(3) 18 Ch. D. 331.

scheme. The first of those reasons, which goes to the root of the whole matter, is a contention on the part of the petitioners that the Board of Education had no jurisdiction to alter the scheme in respect of the local privileges. In order that that point may be understood it is necessary to look at the Acts under which the scheme has been propounded. The first of those Acts is the Endowed Schools Act, 1869, which provides for the making of schemes by the Endowed Schools Commissioners for the application of educational endowments. Sect. 11, which is important on this part of the case as well as on the next objection of the petitioners, which I shall come to directly, is as follows: [His Lordship read the section and also ss. 28 and 45 of the Act and continued :—] In pursuance of s. 28 of the Act the Endowed Schools Commissioners inserted into the scheme of 1877 clause 72, which is as follows: "The Charity Commissioners may from time to time in the exercise of their ordinary jurisdiction frame schemes for the alteration of any portions of this scheme, provided that such schemes be not inconsistent with anything contained in the Endowed Schools Acts of 1869, 1873, and 1874." It will be observed, therefore, that the Commissioners, having power by the Act of 1869 to provide for the alteration from time to time of such portions of the scheme as they think expedient, gave power to the Charity Commissioners, in the exercise of their ordinary jurisdiction, to make alterations by making schemes, and to make those alterations in any portion of the scheme of 1877. What the Board of Education, who have for this purpose succeeded to the powers of the Charity Commissioners, propose to do is to alter certain provisions in the scheme of 1877, as embodied in that of 1903.

At first sight it would appear that the objection put forward by the petitioners is absolutely hopeless. I think the objection is unfounded, but I must explain, if I can, upon what it is based. As I understand it, it is this. It is said, and said with truth, that by virtue of the operation of s. 45 of the Act of 1869 the scheme of 1877 is as much an Act of Parliament as if it had been enacted by that Act. Then it is said, and said also with truth, that the Board of Education have no greater powers than those which the Court had always exercised prior to the

WARRINGTON J.

1908

BERKHAMSTED GRAMMAR SCHOOL, *In re.*

original Charitable Trusts Act, 1853, and that the powers exercised by the Court did not extend to enable it to alter the provisions of a statute. Therefore it is said that the Board cannot alter the statute; therefore they cannot alter the scheme of 1877, which is to be treated as if it were a statute; and therefore that the alteration is made without jurisdiction.

Now, in the first place, if that contention be right, the provisions of s. 28 of the Act of 1869 would be absolutely futile, because it seems to me quite impossible to draw any distinction between any one part of the supposed statute—that is the scheme of 1877—and any other part; and if the Board cannot alter the provisions with regard to the local inhabitants, I cannot see how they can alter anything. That is one answer to the objection. But the better answer is that the Legislature has not been guilty of any such futility as inserting s. 28, giving an express power to alter, which is of no effect. The answer to the argument is that the power to alter is part of the statute of which the scheme of 1877 is itself a part, or rather is to be treated as a part—to be treated as if it had been enacted in the statute. It is exactly the same as if the scheme of 1877 had been originally a statute and that statute had provided that the Board may from time to time frame schemes altering this scheme. It seems to me that that is a complete answer to that objection. If that objection had prevailed it would have been a most serious matter, because I do not know how many schemes might not have been affected by it.

The second objection is one made to the substance of the scheme. It is said that the Board of Education have not had due regard to the educational interests of the class of persons entitled to privileges. The argument is put in this way. It is said that the class of persons who under the scheme of 1877 were entitled to the educational privileges in question were the class of residents in the ancient parishes, and that by the present scheme no regard has been had to their interests, because the scheme abolishes their privileges, and the privileges which it gives are not given to the whole class of residents, but only to a small part, namely, those who are in need of assistance.

First on the construction of s. 11 itself. That section does not provide that the Board in settling a new scheme are to have

due regard to the privileges or educational advantages enjoyed; that is not what they are to have regard to. They are to have regard to the educational interests of the class. In my opinion, unless it can be shewn that they have failed in that, then they have not failed in doing that which s. 11 requires them to do. It is not enough to shew that they have abolished or modified the privileges or educational advantages to which the particular class are entitled; that the section allows them to do; but it says that in doing it they are to have due regard to the educational interests of that class. That has been made clear, I think, by a careful consideration of the case of *In re Hodgson's School* (1), in which the Privy Council thought that due regard had not been had to the educational interests of the class, and by another case, *Ross* v. *Charity Commissioners*. (2) In the first of those cases, when it is carefully considered, it will be found that the judgment of the Privy Council delivered by Lord Selborne is to the effect that the Charity Commissioners had not had regard at all to the educational interests of the particular class, for the reason that they had made no provision for the admission of that class to the school; and the only modification which the Privy Council thought ought to be made in the scheme, therefore, was the modification which gave them the preference of admission, so that they did get an educational advantage that they had previously enjoyed. In *Ross* v. *Charity Commissioners* (2) the question as to the amount of privilege which was given by the scheme came into consideration. The head-note on that point is this: "Where the scheme of the Charity Commissioners increased the amount of tuition fees previously payable by a certain class of boys and added the condition that the trustees shall be satisfied that aid is needed by their parents, *held* that such provision does not fail in due regard to their educational interests within the meaning of s. 11 of the Act of 1869 and s. 5 of the Amendment Act of 1873." Sir Montague E. Smith in delivering the judgment of the Privy Council, referring to the scheme, says this (3): "It is perfectly true that they" (that is, the Charity

(1) 3 App. Cas. 857. (2) 7 App. Cas. 463.
(3) 7 App. Cas. 468.

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

Commissioners) "have altered those conditions" (that is, the conditions under which a certain class of persons had a privilege), "but it was entirely within their power to do so, as the Act enables them to modify educational privileges and advantages; and their Lordships certainly would not interfere with their discretion in making alterations and modifications, unless they saw that it was so wrongly exercised that the Commissioners could not have paid due regard to these privileges and advantages. Changes may happen in parishes which may render it desirable to modify existing privileges: the education given may be better; the means of parents living in the parish may be more ample; all matters of this kind may be taken into consideration by the Commissioners, whilst having due regard to the interests of the classes entitled to educational advantages. It is for them to decide on the extent and degree of modification which new circumstances may require to be made, and it is not for this Committee to override their discretion, unless they are satisfied that it contravenes the provisions of the Act." Applying that to this case, what the Board of Education have to take into account are the educational interests of the class. There are many things which may affect those educational interests. One of those is the efficiency of the school, and if, as I believe to be the fact, the Board have in this case thought it necessary in the interests of the efficiency of the school to increase the tuition fees payable by the great bulk of the residents, I cannot say that in doing that they have not had due regard to the interests of the body of the inhabitants. I think that in so doing they have had due regard to the educational interests. But they have not stopped there, because they have not abolished the whole of the privileges enjoyed by the whole of the class over boys coming from other parts of the kingdom. They have provided in a way which seems at first sight to be a very valuable and prudent way for the gratuitous education, or nearly gratuitous education, of those boys whose parents really require the help. Following the guidance given me by the judgment of the Privy Council which I have just quoted, it is impossible for me to say that in framing this scheme the Board have not had due regard to the educational interests of the class, although they have thought it

right to abolish the pecuniary privilege enjoyed by the great bulk of that class. In my opinion, therefore, that objection fails.

Those are the only two substantial objections to the scheme. There are other objections with which I must now deal, which are objections to the mode of procedure. The first objection is founded on the fact that the scheme actually sealed was sealed without any further notice beyond that which was given of the draft scheme; and it is said that scheme so sealed so departed from the draft scheme that it was substantially a new scheme, and that therefore a fresh notice ought to have been given of it. The statutory provisions with regard to notice are contained in s. 6 of the Charitable Trusts Act, 1860, and s. 7 of the Charitable Trusts Act, 1869.

The provisions of s. 6 of the Act of 1860, so far as material, are these: [His Lordship read the section shortly, and continued:—] That section was supplemented by s. 7 of the Act of 1869, which provides that "Nothing in the Charitable Trusts Acts, 1853 to 1869, shall be deemed to require or to have required the Board, upon modifying a proposed order in manner provided by section 6 of the Charitable Trusts Act, 1860, after the publication thereof, to give public notice of such modified order in the manner provided by that section with respect to the order originally proposed, unless they think further notice desirable." It is said by the petitioners that s. 7 does not apply to the present scheme, because it is not a modification of the draft scheme of December, 1905, but is a new scheme, and that the section does not extend to that which is in substance a new scheme, though in form it may be only a modification of the original scheme. In my opinion that contention is not well founded. It seems to me that the Legislature, by s. 7, has drawn no distinction between one form of modification and another form of modification. The only distinction, if it can be called a distinction, which it has made is that it has given to the Board the discretion of giving further notice if they think it desirable. The true result of s. 6 of the Act of 1860 and s. 7 of the Act of 1869 appears to me to be this: that the Legislature, dealing, as it was dealing, with a department of the public service to

WARRINGTON J.
1908
BERKHAMSTED GRAMMAR SCHOOL, *In re.*

which it has entrusted a wide discretion, has left it to them, when once they have proposed to make a scheme—whether a new scheme or an alteration of a previous scheme—and have given due notice of it, the discretion of deciding whether, if that scheme of which they have given notice requires alteration, they shall or shall not give notice of the alteration in the manner in which they had to give notice of the original scheme. It seems to me that the Legislature has entrusted an absolute discretion to the Board in that matter. It is not my business, and I do not propose to say anything on the question whether I should think it desirable to have given notice in such a case. That is not my province. Assuming it to be true (as I hold it to be true) that the discretion is vested in the Board, it is for them to exercise that discretion, and not for the Court. I can only assume that for reasons satisfactory to themselves they did not think that in this case it was desirable to give further notice, and accordingly did not give it. It seems to me, therefore, that that objection, which is an objection founded on procedure, fails because it rests on a mistaken view of the real effect of s. 6 of the Act of 1860 taken together with s. 7 of the Act of 1869.

There is one further objection with regard to the notice which is to be given, founded on the Local Government Act of 1894. In that Act, which constitutes the parish meeting and the parish council, there is introduced a sub-section which deals with this matter. It is sub-s. 5 of s. 14, which provides that "The draft of every scheme relating to a charity, not being an ecclesiastical charity, which affects a rural parish, shall on or before the publication of the notice of the proposal to make an order for such scheme in accordance with section 6 of the Charitable Trusts Act, 1860, be communicated to the council of the parish, and where there is no parish council to the chairman of the parish meeting"; and that the council "shall for that purpose have the same right as any inhabitants of a place directly affected by the scheme," that is, to make objections. The words "on or before the publication of the notice of the proposal to make an order for such scheme" are what I may call technical words. They are words taken from s. 6 of the Charitable Trusts Act of 1860.

The words there are, "No order . . . . establishing a scheme for the administration of any charity, shall be made by the said Board before the expiration of one calendar month after public notice of the proposal to make such order shall have been given." Those words are repeated in the Act of 1894. The Act of 1894 therefore directs that on or before the date of the publication of the notice required by s. 6, to put it shortly, they shall send the draft. That in this case they did. The Act of 1894 in no way affects s. 7 of the Act of 1869, and it does not provide that the Board shall send the draft of any modification of the original scheme to the parish council, and I can only suppose that the Legislature either thought it not worth while to provide that they should do so, or intended that the notice to be given to the parish council should be on the same footing as the notice to be published under s. 6 of the Act of 1860. Whichever view is taken, there was no necessity, in my opinion, for the Board to give notice of this modified scheme. Whether, if the modification had for the first time affected the rural parish, the notice ought to have been given to the parish council is a matter with which I have not to deal, and I do not therefore propose to say anything about it. It is enough for me to say that in this case, at all events, there was no necessity, in my opinion, under the Act of 1894, to send a draft of the modified scheme to the parish councils.

There is another observation to be made on sub-s. 5 of s. 14, and that is this, that I think it is, to say the least, extremely questionable whether its provisions are not merely directory—whether they in any way affect the jurisdiction of the Board to make a scheme. The sub-section is worded differently, it is to be observed, from s. 6 of the Act of 1860. Sect. 6 of the Act of 1860 provides that no order shall be made until the notice is published. This sub-section does not do that at all; it merely enacts affirmatively that at a certain date the draft of the scheme shall be sent to the parish council. At any rate, without saying more about it, I think it is a question whether, even if the omission to send the draft were a non-compliance with that statute, it would have in any way affected the scheme as made.

I think I have now dealt with all the objections that have been

BIBL. LONDIN UNIV.

WARRINGTON J. 1908 BERKHAMSTED GRAMMAR SCHOOL, *In re.*

raised. The result is that in my opinion the petition fails, and I must dismiss it with costs.

Solicitors: *Chamberlayne & Brookhouse; Solicitor to the Treasury; Ernest Bevir, for A. W. Vaisey, Tring.*

W. I. C.

WARRINGTON J. 1908 *April* 8.

SOUTH EASTERN RAILWAY COMPANY *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

[1907 S. 1107.]

Telegraph — Telephone — Road — Railway — Bridge carrying Public Road over Railway—Power to lay Cable along Bridge without Consent of Railway Company—Licence of Postmaster-General—Telegraph Act, 1863 (26 *&* 27 *Vict. c.* 112), *ss.* 3, 6, *sub-ss.* 1, 4; *s.* 32—*Telegraph Act*, 1892 (55 *&* 56 *Vict. c.* 59), *s.* 5.

By s. 6, sub-s. 1, of the Telegraph Act, 1863, the Postmaster-General has power to place a telegraph under any public road, and by sub-s. 4 he can place a telegraph over or across a railway. By s. 32 of that Act he must not place any work over or across a railway without the consent of the directors thereof; but by the proviso to that section he is not restricted from placing any work in a public road because the road crosses a railway. But s. 32 does not say that in such a case the work shall be deemed not to be carried across a railway. Therefore a licence by the Postmaster-General which empowers a telephone company to exercise his powers of executing works other than works under, in, upon, over, along or across any railway does not authorize them to lay a cable in a public road on a bridge which crosses a railway without the consent of the railway company who are owners of and liable to repair the bridge but do not repair the road.

By an agreement of March 15, 1841, between the South Eastern Railway Company of the one part and the trustees of the roads in the neighbourhood of Tunbridge Wells of the other part, it was agreed that, instead of the railway company carrying their line on bridges over the subsisting turnpike roads, the roads should be diverted and a new road made which should be carried over the railway on a bridge. The railway company were to make and maintain the bridge and the necessary embankments for the elevation of the new road, and were at all

times to maintain at their own cost in complete repair for the convenience of the public the bridge and masonry and works erected therewith. The railway company were to convey to the trustees the soil of such parts of the new roads as belonged to the railway company and a right of way over the bridge.

The bridge was accordingly constructed by the railway company over the railway upon land of which the railway company were by a conveyance of 1838 the owners in fee simple; and on January 12, 1842, the railway company conveyed to the trustees the soil of the roads and the right of way over the bridge.

The new roads were in fact, after they had been dedicated to the public by the conveyance by the railway company to the road trustees, repaired and repairable by the trustees and their successors, the local authority, but the bridge was kept in repair by the railway company.

In the year 1896 the National Telephone Company, Limited, entered into an agreement with the Postmaster-General, by clause 11 of which it was provided as follows: "The Postmaster-General will from time to time at the request of the company authorize the company to exercise within any exchange area specified by the company all such powers of executing works (other than works under, in, upon, over, along or across any railway or canal) as are conferred upon the Postmaster-General by the Telegraph Acts 1863 and 1878 and by s. 2 (but not by any other section) of the Telegraph Act 1892." The 5th proviso to the clause stated that "nothing in this indenture shall be construed to give the company any way-leave or right of way under, in, upon, over, along or across any railway or canal, or any right to execute any work under, in, upon, over, along or across any railway or canal, or to call upon the proprietors or lessees of any railway or canal or the directors or persons having the control thereof to execute any such work." Pursuant to that clause of the agreement the Postmaster-General gave to the defendants a licence dated May 15, 1906, whereby he, under the powers conferred upon him by the Telegraph Act, 1892, s. 5, authorized the defendants to exercise within the urban district of Tonbridge "all such powers of executing works (other than works under, in, upon, over, along or across any railway or

WARRINGTON J.
1908
SOUTH EASTERN RAILWAY v. NATIONAL TELEPHONE COMPANY, LIMITED.

canal) as are conferred upon the Postmaster-General by the Telegraph Acts 1863 and 1878 and by s. 2 (but not by any other section) of the Telegraph Act 1892." In 1906 the National Telephone Company, having, as they alleged, complied with all the conditions of the Telegraph Acts and obtained the licence of the local authority, commenced to lay a telephone cable in a pipe under the roads on each side of the bridge. The railway company (now the South Eastern Railway Company and the South Eastern and Chatham Railway Companies' Managing Committee) objected to the laying of the cable over the bridge. Negotiations took place, and a person alleged to be a representative of the National Telephone Company applied to the railway company for permission and agreed to pay 30*l.* a year for the right to lay and maintain the cable over the bridge. The work was accordingly completed and a three-inch pipe laid under the footway across the bridge at a depth which varied from three to twelve inches. The National Telephone Company in January, 1907, repudiated the agreement, on the ground that the person who made it was not their agent; and they alleged that no consideration had been given for it, inasmuch as they had power to lay the cable over the bridge without permission from the railway company.

The railway company brought this action against the National Telephone Company for a declaration that the defendants were not entitled to construct, use, or maintain any cable over the bridge except upon payment of 30*l.* a year and with the consent of the plaintiffs.

H. Terrell, K.C., *Percy Wheeler*, and *W. Cleveland-Stevens*, for the railway company. The defendants are not entitled to lay a pipe across this bridge without our consent. The bridge was erected by and belongs to us, and we keep it in repair. The licence of the local authority does not help the defendants, for the soil of the road on the bridge does not belong to the local authority except to a very limited extent: *Coverdale* v. *Charlton* (1); *Tunbridge Wells Corporation* v. *Baird*. (2) The defendants have entered into an agreement to pay rent to us for

(1) (1878) 4 Q. B. D. 104. (2) [1896] A. C. 434.

permission to lay pipes over the bridge, and they are estopped from denying our right: *Doe* v. *Baytup*. (1)

The real question in dispute is not whether the Postmaster-General has power to do this work himself, but whether the defendants are authorized by his licence to lay the pipes without our consent; and we submit that they are not. By s. 3 of the Telegraph Act, 1863 (2), the term "public road" means a public

(1) (1835) 3 Ad. & E. 188.

(2) Telegraph Act, 1863 (26 & 27 Vict. c. 112):—

Sect. 3: "The term 'public road' means a public highway for carriages being repaired at the public expense, or at the expense of any turnpike or other public trust, or ratione tenuræ, and not being a street, including the footpaths of such public highway, and any bridge forming part thereof, and also any land by the side and forming part of such a public highway, but not including a railway or canal:

"The term 'railway' includes any station, work, or building connected with a railway. . . . ."

Sect. 6: "Subject to the restrictions and provisions hereinafter contained, the company may execute works as follows:—

"(1.) They may place and maintain a telegraph under any street or public road, and may alter or remove the same:

"(2.) They may place and maintain a telegraph over, along, or across any street or public road, and place and maintain posts in or upon any street or public road, and may alter or remove the same:

"(3.) They may, for the purposes aforesaid, open or break up any street or public road, and alter the position thereunder of any pipe (not being a main) for the supply of water or gas:

"(4.) They may place and maintain a telegraph and posts under, in, upon, over, along, or across any land or building, or any railway or canal, or any estuary or branch of the sea, or the shore or bed of any tidal water, and may alter or remove the same:

Provided always, that the company shall not be deemed to acquire any right other than that of user only in the soil of any street or public road under, in, upon, over, along, or across which they place any work."

Sect. 32: "The company shall not place any work under, in, upon, over, along, or across any railway or canal, except with the consent of the proprietors or lessees, or of the directors or persons having the control thereof. But this provision shall not restrict the company from placing any work (subject and according to the other provisions of this Act) under, in, upon, over, along, or across any street or public road, although such street or public road may cross or be crossed by a railway or canal, so that such work do not damage the railway or canal, or interfere with the use, alteration, or improvement thereof."

WARRINGTON J.
1908
SOUTH EASTERN RAILWAY v. NATIONAL TELEPHONE COMPANY, LIMITED.

highway and any bridge forming part thereof, but not including a railway; and the term "railway" includes any station, work, or building connected with a railway. Therefore this bridge is part of a railway, and is not part of the public road. By s. 6 the company (in the present case the Postmaster-General) may execute works under public roads, and by sub-s. 4 across a railway, but these powers are subject to the restrictions and provisions contained in the Act. By s. 12 the consent of the body having control of the road is required to certain things; and by s. 13 the consent of the landowner is also necessary. We are the landowners within that section, and our consent is necessary, for by s. 3 the term "public road" includes a bridge. By s. 32 for works affecting railways the consent of the directors of the railway is requisite. By the proviso to that section the company may without consent construct works along a public road although it crosses a railway, but that proviso does not say that in that case a telegraph wire shall be deemed not to cross a railway, and the power is subject to the provisions of s. 13. By the Telegraph Act, 1868, s. 2, the term "the company" in the Act of 1863 is also to mean the Postmaster-General, and by s. 4 power is given to him to purchase the undertakings of telegraph companies. By s. 4 of the Telegraph Act, 1869, the Postmaster-General is to have the exclusive privilege of sending telegraphic messages except, by s. 5, (inter alia) messages transmitted with his written licence or consent. Sect. 6 of the Telegraph Act, 1878, does not apply to this case, for our Act of Parliament was passed before 1878, but it shews that it was necessary to give express powers to lay lines across railways. By s. 2 of the Telegraph Act, 1892, the Postmaster-General may apply to the Railway and Canal Commission for power to lay lines over private land, and by s. 5 he may give licences to other persons to exercise his powers.

Whatever powers the Postmaster-General possesses to lay telephone lines across our bridge without our consent, he has not licensed the defendants to exercise those powers. By clause 11 of the agreement of 1896 between them he agreed to authorize the defendants to exercise his powers of executing works other than works "under, in, upon, over, along or across any railway," following the language of s. 32 of the Act of 1863. The

licence is in similar terms, and the defendants have no further powers.

Roskill, K.C., and *H. H. Gaine*, for the telephone company. The pipe in question is not laid in any part of the railway company's property. They admit that the road is not repairable by them; therefore s. 13 of the Act of 1863 does not apply, for that section only applies where the landowner is liable to repair the road. It may be that the bridge is part of the railway and not part of the public road, but the pipe is only laid in the skin of the road, in that part of the road which would be frequently disturbed for repairs by, and is vested in, the local authority. The Postmaster-General has full power to do this work himself, although s. 7 of the Act of 1892 says that nothing in that Act shall apply to the undertaking of any railway or canal company authorized by an Act of Parliament. What we are doing is not carrying a telegraph line across a railway; we are placing and maintaining it under a public road within s. 6, sub-s. 1, of the Act of 1863, notwithstanding that it happens to cross a railway. For this purpose the powers given by the Act are unrestricted.

This is none the less a public road because it happens to cross a railway; and the fact that the plaintiffs repair the bridge is immaterial. We are not acting under the powers of s. 6, sub-s. 4, of the Act of 1863, which refers to laying a pipe on the railway line itself. The licence of the Postmaster-General authorizes us to exercise the powers of sub-s. 1, and they are sufficient without the powers of sub-s. 4, which he has excluded. We are within the proviso to s. 32, which expressly authorizes us to place a line on a public road although it crosses a railway. The only consent required is that of the local authority, and that we have obtained. If there is no power to do this the local authority could not give their consent to it: *Harvey* v. *Truro Rural Council*. (1) The exception in the licence really refers to s. 6 of the Act of 1878.

The agreement to pay rent to the plaintiffs was not made by an agent authorized by us to do so, and there was no consideration for it, inasmuch as the consent of the plaintiffs was unnecessary. Therefore we are entitled to repudiate it.

(1) [1903] 2 Ch. 638.

WARRINGTON J.
1908
SOUTH EASTERN RAILWAY v. NATIONAL TELEPHONE COMPANY, LIMITED.

Percy Wheeler, in reply. That the pipe is only laid in the skin of the road is immaterial. The soil of the highway is only vested in the local authority so far as is necessary for the control, protection, and maintenance of the street as a highway for public use: *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co.* (1) This pipe is below that limit, and the soil is in us. On the question of the agreement to pay rent, it is clear that our permission to the defendants to interfere with the surface of the road was a good consideration: *Edgware Highway Board* v. *Harrow District Gas Co.* (2)

WARRINGTON J. The plaintiffs in this case are the South Eastern Railway Company and the South Eastern and Chatham Railway Companies' Managing Committee. The defendants are the National Telephone Company, Limited. The South Eastern Railway Company are the owners of a bridge crossing their railway at Tonbridge Station. They are the owners of that bridge by virtue of a conveyance of 1838. The bridge carries a public road. That public road was constructed under an agreement of 1841 by the road trustees of that period, and it is repairable and repaired, not by the railway company, but by the local authority. The National Telephone Company have, under an agreement made between themselves and the railway company, carried a cable under the surface of the footpath of that road and a few inches in places above the masonry of the bridge. They now say that they were all along authorized by the statutory provisions which govern their operations to carry that cable as they did across the railway company's bridge without any consent on the part of the latter company; that the agreement which they have entered into was, therefore, without consideration; and that, though they have carried their cable along the bridge by virtue of that agreement and availed themselves of the privilege which it gave them, they are not bound to fulfil their part of the agreement and to pay the 30*l.* a year which they thereby promised to pay as a wayleave.

The National Telephone Company did these works by virtue of a licence granted to them by the Postmaster-General. That

(1) [1899] 1 Ch. 474. (2) (1874) L. R. 10 Q. B. 92.

licence is a limited licence, and confers upon them the right to do certain works other than works under, in, upon, over, along or across any railway or canal; and the real question that I have to determine is whether this cable is constructed across a railway. If it is, it is not within the authority conferred by the licence of the Postmaster-General. In one sense, in the obvious sense, it is across the railway—the bridge crosses the railway, and the cable is laid on the bridge; it is plainly, therefore, in the physical sense, both over and across the railway. But it is said that for the purposes of the true construction of the Telegraph Act of 1863 I ought to say that that which is physically over and across a railway is not over or across the railway if it happens to be in a public road which is over or across a railway. Whether that is right or not seems to me to be the question I have to determine. [His Lordship stated the facts, and said that the agreement was made by the authorized agent of the defendants, and continued:—]

As I have said, the real question is, What are the powers which the National Telephone Company, as the licensees of the Postmaster-General, can exercise? And the first thing to be ascertained is, What are the powers of the Postmaster-General? They depend on the Act of 1863. The Telegraph Act of 1863 was a kind of Telegraph Clauses Act, and it contains the code substantially by virtue of which telegraph lines were and are constructed, except so far, of course, as it has been amended by subsequent Acts. The material parts of the Act of 1863 are, first, the 3rd section, containing certain definitions, and particularly that part of it which defines "public road": "The term 'public road' means a public highway for carriages being repaired at the public expense, or at the expense of any turnpike or other public trust, or ratione tenuræ, and not being a street, including the footpaths of such public highway, and any bridge forming part thereof, and also any land by the side and forming part of such a public highway, but not including a railway or canal." The term "railway" is defined to include "any station, work, or building connected with a railway." Now, taking those two definitions together, the bridge in question is a work connected with the railway. I think that is quite plain.

WARRINGTON J.
1908
SOUTH EASTERN RAILWAY v. NATIONAL TELEPHONE COMPANY, LIMITED.

Therefore the bridge is not part of a public road, because, being a railway—that is to say, being within the definition of "railway"—it is excluded from the definition of public road. Then the powers of a telegraph company are conferred by s. 6: "Subject to the restrictions and provisions hereinafter contained the company may execute works as follows: (1.) They may place and maintain a telegraph under any street or public road, and may alter or remove the same"; and by sub-s. 4 "They may place and maintain a telegraph and posts under, in, upon, over, along or across," amongst other things, "any railway." Now, stopping there for a moment, the power of the Postmaster-General—who is for the present purpose the company, because the powers of the company were subsequently vested in the Postmaster-General—to carry a telegraph over this bridge seems to me to depend not on sub-s. 1, but on sub-s. 4 of s. 6, for the reasons that I have just mentioned: that this bridge, being a work connected with a railway, is not part of the public road for the purposes of this Act, though it carries the public road; and in order, therefore, to carry the telegraph over this bridge the Postmaster-General would have to resort to s. 6, sub-s. 4. Having regard to the view which I take, I need not refer to ss. 12 or 13 of that Act. I will go at once to s. 32, which provides this: "The company shall not place any work under, in, upon, over, along, or across any railway or canal, except with the consent of the proprietors or lessees, or of the directors or persons having the control thereof." Now, to stop there for one moment, that is one of the restrictions referred to in the opening words of s. 6. Therefore sub-s. 4 must be read subject to the restriction that the telegraph cannot be placed or maintained under, in, upon, over, along or across a railway without the consent of the proprietors of the railway, or of the directors having control thereof. So far, then, if the Postmaster-General were carrying this telegraph over the railway, he would require the consent of the directors of the railway company. But then there is tacked on a proviso. The proviso is this: "This provision"—that is, that the consent is required—"shall not restrict the company"—the Postmaster-General for this purpose—"from placing any work (subject and according to the other

provisions of this Act) under, in, upon, over, along, or across any street or public road, although such street or public road may cross or be crossed by a railway or canal, so that such work do not damage the railway or canal, or interfere with the use, alteration, or improvement thereof." Now what is the meaning of that? It seems to me merely this, that if, though it crosses a railway, it crosses a railway by a public road, the Postmaster-General may then lay the cable across the railway without the consent required by s. 32; but s. 32 does not say that the telegraph shall then be deemed not to be carried across the railway. It does not say that at all. It seems to me that the Postmaster-General, in carrying the cable or the telegraph across the railway, would still be exercising the powers of sub-s. 4 of s. 6.

If that is so, then I have to consider what power the Postmaster-General has conferred upon the National Telephone Company. Now that depends partly upon an agreement between them and partly upon a licence which he has granted pursuant to that agreement; but I must first refer to the statutory powers which the Postmaster-General has for granting such a licence. The steps which the Legislature took were these. In 1868 the Postmaster-General was, to state it shortly, constituted a company for the purposes of the Act of 1863; then by the Act of 1869 the exclusive right subject to certain exceptions of constructing and maintaining telegraphs was vested in the Postmaster-General; then by the Act of 1878 certain special powers were conferred upon the Postmaster-General of constructing telegraphs along, over or across railways which were to be built under Acts passed subsequent to the year 1878, not, therefore, applying to this railway. Then came the Act of 1892, s. 5, which is the one under which the Postmaster-General has granted the licence in question. Sect. 5 of that Act is as follows: "Where the Postmaster-General has, either before or after the passing of this Act licensed any company or person to transmit any telegrams within the meaning of the Telegraph Acts, 1863 to 1889"—and that he has done in the case of the National Telephone Company —"he may by the same or any other licence, authorize such company or person (in this Act referred to as the licensee) during

WARRINGTON J.
1908
SOUTH EASTERN RAILWAY v. NATIONAL TELEPHONE COMPANY, LIMITED.

the time and within the area specified in the licence, to exercise the powers which are conferred on the Postmaster-General by the Telegraph Acts 1863 and 1878, and by the provisions of this Act relating to provisional orders, or such of those powers as are specified in the licence, and thereupon the enactments conferring those powers or relating to the exercise thereof, including any penal provisions, shall apply accordingly."

Now in the year 1896 the Postmaster-General of the time entered into an agreement with the National Telephone Company with reference to telephones, and by clause 11 of that agreement it was provided as follows: [His Lordship read it.] Pursuant to that agreement the Postmaster-General has given a licence under which the National Telephone Company claim to act. That licence is dated May 15, 1906; it is expressed to be in accordance with the 11th clause of the agreement I have just read, and to be given at the request of the company. It authorizes the company, subject to the conditions and provisions hereinafter referred to, to exercise within the districts specified in the schedule hereto, being urban districts situate within or constituting exchange areas as defined by the indenture of 1896, "all such powers of executing works (other than works under, in, upon, over, along or across any railway or canal) as are conferred upon the Postmaster-General by the Telegraph Acts 1863 and 1878 and by s. 2 (but not by any other section) of the Telegraph Act 1892." Now is this a work which is a work in, upon, over, along or across a railway or canal? As I have said, unquestionably physically it is over and across the railway. It will be gathered from what I have said when I have been dealing with the Act of 1863 that in my opinion there is nothing in that Act which makes it less a work over or across a railway because it is also a work along a road. In my judgment the Postmaster-General, if he had himself claimed to construct this work, would have constructed it under the powers which authorize him to carry a work across or over a railway, and the only effect of s. 32 is that in exercising those powers he would not have required the consent of the railway company if he had exercised the powers, because, being a work on a public road, the proviso to s. 32 in that

case excludes the necessity of consent. But the true effect of s. 32, in my opinion, is that the work is none the less over or across the railway because it is in the road. The result of s. 32 is that though the work be over or across the railway, yet in that case the consent is not required. In my judgment, therefore, on that point the plaintiffs are entitled to succeed, and, as I have come to that conclusion, it is unnecessary to consider whether, even if the National Telephone Company were by their licence authorized to construct this work without the consent of the railway company, they are nevertheless bound by their agreement. I need say nothing about that. I need say nothing about the point which has been raised in argument as to the necessity of requiring the plaintiffs' consent under s. 13 of the Act of 1863, on the footing that, though they are liable to repair the bridge, they are not liable to repair the road.

I think for the reasons that I have stated it follows that the defendants were not authorized to construct this work at all, but they certainly were not authorized to construct it without the consent of the railway company Therefore there was good consideration for the agreement. The plaintiffs are entitled to a declaration that the defendants were not at liberty to construct, and are not at liberty to use or maintain, the pipe, cable or works in question in, upon, or over the bridge except upon paying the annual rent of 30*l.* and with the plaintiffs' consent. The defendants must pay the costs of the action.

Solicitors: *John W. Watkin; W. E. Hart.*

H. C. R.

WARRINGTON J.
1908
April 10.

In re CARSHALTON PARK ESTATE, LIMITED.
GRAHAM *v.* THE COMPANY.
TURNELL *v.* THE COMPANY.

[1908 C. 1124.]
[1908 C. 636.]

Practice—Cause of Action—Issue of Writ—Company—Debenture—Floating Security—Principal not yet payable—Interest not in default—Jeopardy—Receiver.

The Court has jurisdiction to appoint a receiver and manager of the undertaking and assets of a company on the application of the holder of a debenture issued by the company, secured by a floating charge, if the principal money thereby secured has become due before the time when the application is made, although at the date of the issue of the writ no default had been made in payment of interest, the money was not payable, and the security was not in jeopardy.

The holder of a debenture secured by a floating charge on the assets of the company issued a writ in an action claiming an account, execution of the trusts of the debenture trust deed, realization of the security, and the appointment of a receiver and manager. At the date of the issue of the writ the principal money secured was not due and no default had been made in payment of interest. The plaintiff moved for the appointment of a receiver and manager, but the motion was refused on the ground that the money was not due, no default had been made, and the security was not in jeopardy. After the money became due the plaintiff served another notice of motion for the appointment of a receiver and manager. This was opposed on the ground that the plaintiff had no cause of action when he issued his writ and that the action could not be maintained:—

Held, that the plaintiff as the holder of a floating security had a right to issue his writ before the money became payable, and that the Court had jurisdiction, inasmuch as the money was now payable, to appoint a receiver and manager.

Bonham v. *Newcomb*, (1684) 1 Vern. 232, distinguished.

MOTIONS.

The Carshalton Park Estate, Limited, was incorporated on March 17, 1897, to acquire and develop a building estate, and in the same year issued a series of mortgage debentures to a total amount of 20,000*l*. The debentures were all in the same form

for 100*l.* each, and by them the company agreed to pay to the registered holder thereof the principal sum secured on April 5, 1905, and in the meantime interest at 5 per cent. per annum; and the company charged with these payments all its undertaking and property as a floating security. The principal was to become immediately payable on, amongst other events, the appointment of a receiver. These debentures were secured by a trust deed of July 1, 1897. In March, 1905, the debenture-holders agreed with the company that the debentures should remain outstanding till April 5, 1908, instead of April 5, 1905.

On February 24, 1908, Mr. G. M. Turnell, a debenture-holder who was also one of the trustees of the deed, on behalf of himself and all the other debenture-holders entitled to the benefit of the deed, issued a writ against the company and Mr. D. F. Nevill, the other trustee, and Sir W. Jaffray, Bart., a holder of second debentures, claiming an account of what was due to the debenture-holders, execution of the trusts of the deed, realization of the security, and the appointment of a receiver and manager; and on February 28, 1908, he moved for the appointment of a receiver and manager of the undertaking and property of the company on the ground that the company was commercially insolvent and the debenture-holders' security was in jeopardy. At this time no default had been made in payment of interest and the principal was not yet due; and, after the motion had stood over for a week, Warrington J. on March 6 made no order on it, except that the defendants' costs be their costs in the action.

In March, 1908, the company by a circular asked the debenture-holders to postpone their debentures till 1911, and in another circular of April 4 the company said that it could not pay off the debentures on April 5, and that, as Mr. Turnell's action was pending, it did not intend to pay the interest till the action was finished.

On April 5 the principal became payable, but that day was a Sunday, and on April 6 Mr. Turnell gave a second notice of motion in the same action for the appointment of Mr. P. H. Carter, a chartered accountant of Birmingham, as receiver and manager.

WARRINGTON J.
1908
CARSHALTON PARK ESTATE, LIMITED, *In re.*
GRAHAM *v.* THE COMPANY.
TURNELL *v.* THE COMPANY.

On the same day, April 6, a Mr. F. E. Graham, the holder of one first debenture, commenced proceedings and issued a writ, on behalf of himself and all the other debenture-holders entitled to the benefit of the trust deed, against the company, the trustees of the deed, and Sir P. A. Makins (representing the second debenture-holders), claiming similar relief to that asked for in Mr. Turnell's action. On the same day he gave notice of motion with the writ by special leave for the appointment of Mr. J. H. Hiley, a land agent in London and managing director of the company, as receiver and manager of the company's undertaking.

H. Terrell, K.C., and *B. A. Hall*, for the plaintiff in the motion in Mr. Graham's action. The appointment of a receiver and manager ought to be made on our motion, not on that of Mr. Turnell. He had no cause of action when he issued his writ, and the whole of the proceedings in his action are invalid. On February 24 there was no default or jeopardy and the principal money was not due. Any doubt on that point is disposed of by the circumstance that on February 28 your Lordship refused his first motion on that very ground; and he cannot avail himself of a cause of action which has arisen subsequently: *Beardmore* v. *Gregory*. (1) It is true that the Court will appoint a receiver before the money becomes payable, and thus crystallize the security, but that is on the ground that jeopardy existed when the writ was issued, and that the security ought to be preserved.

[WARRINGTON J. In Coote on Mortgages, 7th ed. p. 1021, it is said that proceedings for foreclosure on a mortgage security cannot be maintained until the estate has become forfeited at law by default in payment on the day appointed. *Bonham* v. *Newcomb* (2) is the only case cited, and it does not appear to be an authority for that proposition.]

A bill for redemption would have been dismissed with costs if the plaintiff had no title, and he could not subsequently purchase the equity of redemption and graft the new title upon the original bill: *Pilkington* v. *Wignall*. (3) On the same principle a bill for

(1) (1865) 2 H. & M. 491, 496.
(2) 1 Vern. 232.
(3) (1817) 2 Madd. 240.

foreclosure would have been demurrable if the time for payment had not arrived. Mr. Turnell could not have obtained a declaration that he was entitled to a charge, for no one disputed it; he could not have obtained administration, for he had no cause of action.

A. B. Nutter, for the company, supported the same contention.

Cave, K.C., and *Sargant*, for Mr. Turnell. As holders of a floating security we had an immediate equitable charge at the time when the writ was issued, and that was a sufficient cause of action: *Wallace* v. *Evershed*. (1) The Court frequently appoints a receiver where jeopardy is proved at the time of the hearing of the motion, although there was none when the writ was issued. It has been recently done in *Ranson* v. *Bird* (2), before Joyce J., on March 17, 1908, and in *Moore* v. *Prestea Mines, Ld.* (2), before Eve J., on March 20, 1908. If our writ is bad Mr. Graham's writ is also bad. April 5 was a Sunday, so the company had the whole of Monday, the 6th, in which to pay, and his writ must have been issued before 4 P.M. on the 6th. On the balance of convenience our nominee should be appointed.

[They were stopped by the Court.]

A. G. Mathews, for Mr. Nevill and Sir W. Jaffray, also took this view.

WARRINGTON J. I propose to deal first with the application in Mr. Turnell's action. [His Lordship stated the facts and proceeded:—] This motion is now made, first, on the footing that the principal money secured by the debentures is due, and therefore that the mortgagee is entitled to assert his rights and have a receiver appointed, and, secondly, on the ground that, although there was no evidence at the time of the previous motion, there is now evidence that the security is in jeopardy. I do not propose to say anything on the second ground, for in my opinion the first is sufficient to justify the appointment. It is contended on behalf of the defendants that no order ought to be made for the appointment of a receiver in this action because when the writ was issued there was no cause of action which could entitle the plaintiff to sue. Logically it must follow that, if the

(1) [1899] 1 Ch. 891. (2) Unreported.

WARRINGTON J.
1908
CARSHALTON PARK ESTATE, LIMITED, *In re.*
GRAHAM *v.* THE COMPANY.
TURNELL *v.* THE COMPANY.

defendants are right, no order whatever can be made in this action; that the action is altogether unfounded and no order can be made in it. Is that so? It is stated in a well-known text-book, Coote on Mortgages, 7th ed. p. 1021, that "proceedings for foreclosure on a mortgage security cannot be maintained until the estate has become forfeited at law by default in payment on the day appointed." This proposition is founded on an expression of the Lord Keeper in *Bonham* v. *Newcomb* (1) to the effect that "by a bill to foreclose a man, you shall only bar him of his equitable title, when the estate in law is become forfeited." That was only a dictum, for the case turned upon the effect of a peculiar covenant, and the Lord Keeper certainly did not decide that a bill for foreclosure could not be maintained, in the sense that it would be demurrable, until the money had become payable; although the plaintiff might not be able to get a decree till then.

What is the modern practice? Undoubtedly the holder of a floating security has a charge although the time for payment has not arrived. There is no doubt about that; it has frequently been decided in such cases, for instance, as those between debenture-holders and execution creditors. The Court to my own knowledge has frequently entertained suits for the realization of such a security instituted before the money has become due, and has appointed a receiver on the ground that the security was in jeopardy. By appointing a receiver it has caused the security to be crystallized; then, the security having been crystallized by the appointment of a receiver, it has been the constant practice of the Court to make an order for realization, even though the time for payment has not arrived. That is on the ground that the appointment of the receiver has put an end to the floating security and the time has come when the security ceases to be floating, and the time has come for realization although the time fixed for payment has not arrived. That seems to be the foundation of the practice, and there is no doubt that it is the practice. I think, therefore, the Court must hold, and there is no reason for not holding, that where there is a floating security the holder of it has a right to issue his writ for the protection of his interests before the money has become payable. It may be that when

(1) 1 Vern. 232.

the action comes on for hearing the evidence will not justify a decree; but if, when it comes on, the evidence shews that the money has become due, or that something has happened which has crystallized the security, there is jurisdiction to make the usual order for realization of the security and, so far as is necessary, for foreclosure. That has been done in several cases, and quite recently, as I am informed, in *Ranson* v. *Bird* (1), before Joyce J., on March 17, 1908, and in *Moore* v. *Prestea Mines, Ld.* (1), before Eve J., on March 20, 1908. At all events, after the money has become due such a judgment can be pronounced by the Court. In the present case the money has become due, the suit has become maintainable, and I see no reason why I should not appoint a receiver on the second motion if there is nothing else in the case, although the evidence on the first motion was not sufficient to justify the appointment. As there is nothing but the opposition of another debenture-holder, I think I ought to appoint a receiver.

So far I have been dealing with the action of Turnell against the company. Meanwhile, however, a good deal has happened. As I have said already, default was made in payment of the money when it became due on April 6. It is proved that circulars were sent out by the company to some of the debenture-holders, but not to all of them. The first circular was dated March 29, 1908, the object being to invite the debenture-holders to consent to a further postponement of the date of payment. They did not agree to that, and on April 4 another circular was sent out stating that the company was not in a position to pay the debentures off on April 5, when they became due. Mr. Turnell's action was alluded to in that circular as being still pending, and the circular invited the debenture-holders to await the result of that action. On the morning of April 6 an application was made to me at 10.30 in chambers for leave to serve notice of motion with the writ in an action brought by Mr. F. E. Graham, on behalf of himself and all the other debenture-holders entitled to the benefit of the trust deed, against the company, the trustees of the deed, and Sir P. A. Makins, representing the second debenture-holders.

(1) Unreported.

WARRINGTON J.
1908
CARSHALTON PARK ESTATE, LIMITED, *In re.*
GRAHAM *v.* THE COMPANY.
TURNELL *v.* THE COMPANY.

As the application was made to me at that time, I assume that the writ had then been issued; otherwise the application would have been improper. Therefore the writ was issued before 10.30 A.M. on April 6. At that time the money had not become due, as the company had the whole of that day in which to pay. I lay no stress upon that, and I only mention it to shew that the applicant was anxious to lose no time in trying to interpose so as to get a receiver appointed. Mr. F. E. Graham is the holder of one debenture for 100*l.*, and he asks for the appointment as receiver of the managing director of the company, who has been managing director ever since the company was incorporated. In support of his application he only states the fact that the money has become due and asks for the appointment of a receiver as a matter of course. It is objected on behalf of Mr. Turnell that the appointment of the managing director is not the most advisable course to pursue where the mortgagees desire to interpose and protect the property for themselves. The company consents to Mr. Graham's application although it opposes Mr. Turnell's, but I do not regard that as a circumstance which should make me disposed to accede to Mr. Graham's application. The company objects to the appointment of Mr. Turnell's nominee on the ground that he is an accountant living at Birmingham. I am not impressed by that. The management of such an estate as this does not require constant attention, and I do not see why a manager should not do the work as well from Birmingham as any one residing in London. I see no reason why Mr. Carter should not conduct the company's affairs satisfactorily, so I think it my duty in Mr. Turnell's action to appoint Mr. Carter in the ordinary way to be receiver and manager.

In Mr. Graham's action the proper course will be to make no order on the motion, except that the costs of the application will be costs in that action. I will make no order about costs in Mr. Turnell's action, as they will according to the practice be costs in the action without any special direction.

Solicitors : *Sharpe, Pritchard & Co., for Mathews, James & Crosskey, Birmingham; H. A. Graham & Wigley.*

H. C. R.

WARRINGTON J.
1908
April 28; *May* 2.

In re ABRAHAMS.
ABRAHAMS *v.* ABRAHAMS.

[1908 A. 192.]

Administration—Will—Immediate Gift of Share of Residue—Debt due from Beneficiary to Testator payable by Instalments—Right of Executors to retain Share to answer Debt.

Where at the death of a testator a debt is owing to him by a person to whom a share of residue is immediately given by the will, but the debt is payable by instalments, the executors are not entitled to retain the share of the beneficiary as against the future instalments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such instalments.

In re Rees, (1889) 60 L. T. 260, followed.

In re Ackerman, [1891] 3 Ch. 212, distinguished.

ORIGINATING SUMMONS.

For some years prior to 1904 the testator, H. A. Abrahams, had carried on business with his two sons, A. A. Abrahams and L. H. Abrahams, as warehousemen. The partnership was dissolved by agreement as from January 15, 1904.

On February 5, 1904, the two sons entered into a deed of covenant with their father by which they jointly and severally covenanted to pay him the sum of 24,673*l.* 9*s.* 3*d.* (being the value of his share of the business) on February 15, 1904, with interest thereon at 5 per cent. from January 15, 1904, and thereafter, so long as such sum or any part thereof remained unpaid, to pay to him interest for the same at 5 per cent. by equal monthly payments on the 15th day of every calendar month. The deed contained a proviso that if the sons paid the principal sum of 24,673*l.* 9*s.* 3*d.* by instalments of not less than 1000*l.* on January 15 of each year until such principal sum was fully paid, or within fourteen days thereafter, and also paid the monthly sums of interest as therein provided, the testator would accept the payment of the principal sum by instalments.

L. H. Abrahams died on June 20, 1905.

The instalments for the years 1905, 1906, and 1907 were paid to

WARRINGTON J.
1908
ABRAHAMS, *In re.*
ABRAHAMS *v.* ABRAHAMS.

the testator and accepted by him, although not paid within the fourteen days provided by the covenant.

The testator by his will dated May 22, 1907, released the executors of the will of L. H. Abrahams and his estate and effects from liability to payment of the debt under the deed of February, 1904, and A. A. Abrahams from liability to payment of 2600*l.*, part of the same debt, and, after making various bequests, devised and bequeathed all his residuary real and personal estate to his trustees upon trust to sell and convert and to stand possessed of the proceeds upon trust for his four children therein named, including A. A. Abrahams.

The testator died on November 6, 1907.

On February 26, 1908, A. A. Abrahams paid the instalment due on January 15, 1908.

The net value of the testator's residuary estate was about 40,000*l.*, and accordingly the value of the one-fourth share of A. A. Abrahams was about 10,000*l.* The amount remaining due from him in respect of the debt was about 18,000*l.*

The present summons was taken out by the executors and trustees of the will for the determination of the question (inter alia) whether they should retain the whole or any part of the one-fourth share of A. A. Abrahams of such parts of the testator's residuary estate as should from time to time have been got in until such time as he should have fully discharged his liability under the deed of February 5, 1904, by payment of the balance of the principal thereby secured (except the sum of 2600*l.* from the payment whereof the testator by his will released him) and the interest thereon.

On the hearing of the summons the first question argued was whether the balance of the debt due by A. A. Abrahams to the testator's estate had become immediately payable, or whether it was still payable by instalments. Warrington J. held upon the facts and upon the construction of the will that it was still payable by instalments. The arguments on this point are therefore omitted.

E. S. Ford, for the summons.

H. Terrell, K.C., and *Ward Coldridge*, for A. A. Abrahams.

The second question is whether the executors are entitled to retain the whole of A. A. Abrahams' one-fourth share of the testator's residuary estate until the remaining instalments of the debt have been paid, and it is submitted that they are not. The case is covered by *In re Rees.* (1) The gift of the one-fourth share was an immediate gift, and the debt is payable in futuro. There can therefore be no retainer by the executors.

[They also referred to *In re Watson* (2); *In re Wheeler.* (3)]

J. D. Israel, for other beneficiaries. If nothing is paid to A. A. Abrahams the executors will not, strictly speaking, be retaining or setting off anything. His share of the residue is one-quarter and the debt amounts to one-half the residue, and his claim is really to be overpaid. It is a well-settled principle of law that a beneficiary who as a debtor is bound to contribute to the general mass of the estate cannot take out a share of it without first making his contribution and completing that mass. That principle has been applied to statute-barred debts—*In re Ackerman* (4)—and was recognized in *In re Wheeler.* (3) Even although the debt be not presently payable, it is submitted that that principle applies. The beneficiary in the present case has part of the estate exceeding the amount of his share in pocket, and therefore has been paid his share.

[WARRINGTON J. So had the debtor in *In re Rees.* (1)]

That was a different case from this. There the debt was not an ascertained debt. The present case falls somewhere between *In re Rees* (1) and *In re Ackerman.* (4)

[WARRINGTON J. You cannot rely on anything I said in *In re Wheeler* (3) in support of your contention.]

The principle of *In re Ackerman* (4) does not rest on retainer or set-off, but on this, that "the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back."

WARRINGTON J. The question in this case is whether under the circumstances to which I shall presently refer the trustees of the testator's will are entitled to retain the share of one of the

(1) 60 L. T. 260.
(2) [1896] 1 Ch. 925.
(3) [1904] 2 Ch. 66.
(4) [1891] 3 Ch. 212, 219.

WARRINGTON J.
1908
ABRAHAMS, *In re.*
ABRAHAMS *v.* ABRAHAMS.

testator's sons, A. A. Abrahams, in his residuary estate in respect of a debt owing by A. A. Abrahams to the testator. The debt in question was a debt which (putting it shortly) was payable by instalments, and the two questions I have to determine are, first, whether at the death of the testator and at the time when the question became material the debt was still payable by instalments, and, secondly, if it was, whether the trustees are entitled to retain his share in the residuary estate against it. Now the facts are these. [His Lordship stated them, and upon the first question held, on the construction of the will and upon the facts, that the debt had not become immediately payable, but was still payable by instalments. He continued :—] The second question is one as to which there does not seem to be much authority. It is this: if a debtor to an estate owes a sum which is payable in futuro, and he is entitled to receive from the estate a sum which is payable in præsenti, can the executors retain that sum in respect of the debt which is not immediately payable? If they can do so, the result would be to alter the contract between the testator and the debtor, because it would make the debtor pay his debt before it is due. Is that the law? The authority which is most in point is, I think, *In re Rees.* (1) There a person owed a sum of money. The debtor filed a liquidation petition. The creditor proved for the debt in the liquidation but received no dividend. In the lifetime of the creditor the liquidation was closed, but no discharge was granted to the debtor. Thirteen months after the close of the liquidation the creditor died, having by his will bequeathed to the debtor a legacy of 1000*l.*, which was more than the amount of the debt. Under the law as it then stood and in the circumstances of that case the debt was one of which the remedy was suspended and could not be enforced until three years after the close of the liquidation, that is, after the legacy became payable to the debtor. Under those circumstances the question arose whether the executors of the will were bound to pay the legacy, or whether they were entitled to retain it as against the debt. Kekewich J. held that they were bound to pay it. After referring to the circumstances of the case and to the fact that payment of the

(1) 60 L. T. 260.

debt was postponed, he says (1): "It seems to me, therefore, that at the moment of death the testator could not have enforced his right, and not having been able to enforce it, he cannot give it to his executors. Therefore the whole sum of 1000*l.* was a legacy which would have been payable to the bankrupt if he could have come forward and said that it was payable into his own hands." The important point is that Kekewich J. held that, because the remedy for the debt was postponed and the legacy was payable in præsenti, the debtor could compel the executors to pay the legacy, and that the persons who were entitled to the legacy by virtue of an assignment from the debtor were also entitled to have it paid notwithstanding the debt. That case seems to me to be exactly in point, because it is immaterial how the remedy for the debt is postponed, whether under the bankruptcy laws or otherwise. Is there any authority the other way? Reliance has been placed on two cases. One is *In re Ackerman*. (2) That was a case in which the debts in question, which were advances made by a testator to his sons, were barred by the Statute of Limitations, and Kekewich J. held that nevertheless the sons must bring those debts into account before they could receive their shares in the testator's residuary estate. The principle of that case was entirely different. There the remedy for the debts was barred altogether, but the debts remained. If a creditor can recover a debt by some means other than an action, the Statute of Limitations does not prevent him doing so. The effect of the statute is to bar the remedy, not the debt. There is really no other authority on the point, except perhaps a decision of my own in *In re Wheeler* (3), to which I am unwilling to refer. But, if anything, it supports the view which I am now taking.

In my opinion the ground on which the present case is to be decided is that the debt due to the testator is one which is not immediately payable, whereas the right of the debtor to receive the residuary share is an immediate right. I think, therefore, that the debtor is entitled to receive that share, and that the

(1) 60 L. T. 261. (2) [1891] 3 Ch. 212.
(3) [1904] 2 Ch. 66.

WARRINGTON J.
1908
ABRAHAMS, *In re.*
ABRAHAMS *v.* ABRAHAMS.

executors are not entitled to retain it as against any future payments which may have to be made under the deed of February 5, 1904.

Solicitors: *A. E. Sydney; Hyman Isaacs & Lewis.*

W. I. C.

WARRINGTON J.
1908
April 28, 29; *May* 4.

In re OLIVER.
WILSON *v.* OLIVER.

[1907 O. 1030.]

Tenant for Life and Remainderman—Will—Settlement by way of Trust for Sale—Conversion—Real Estate—Postponement of Sale—Interim Rents—Enjoyment in Specie.

Where by a will real and personal estate are directed to be sold and converted, and the proceeds held in trust for one for life, and then for others, and without any impropriety the sale is postponed, the tenant for life of the proceeds is entitled to the rents and profits of the real estate until sale.

In re Searle, [1900] 2 Ch. 829; *In re Earl of Darnley*, [1907] 1 Ch. 159, followed.

Genery v. *Fitzgerald*, (1822) Jac. 468; *Bellairs* v. *Bellairs*, (1874) L. R. 18 Eq. 510; and dictum of Lord Macnaghten in *Wentworth* v. *Wentworth*, [1900] A. C. 163, 171, considered and explained.

ORIGINATING SUMMONS.

Thomas Blossom Oliver, by his will dated September 12, 1905, after bequeathing to his wife Mary an immediate legacy of 2000*l.* and all his household furniture and effects, gave and devised all his real and personal estate unto his trustees upon trust for sale and conversion, and after payment of his debts, funeral and testamentary expenses and the said legacy, upon trust to invest the net residue and pay the income thereof to his wife during her life and after her death upon trust to pay and divide the corpus from which the said income was derived and the investments equally between and amongst all his brothers and sisters in equal shares as tenants in common. The will contained no power to postpone the conversion of the estate.

The testator died on September 13, 1905, possessed of considerable real and personal estate.

Part of the real estate and the whole of the personal estate had been converted and the proceeds applied in payment of the debts, funeral and testamentary expenses, and in or towards the discharge of incumbrances on the unsold real estate, which now constituted the entire estate and had been retained unconverted in the interests of the several beneficiaries.

The present summons was taken out by the trustees of the will for the determination of the question (inter alia) whether the plaintiffs as trustees ought to make any, and if any what, payment to the defendant Mary Oliver by way of income in respect of the real estate of the testator remaining unconverted and on what principle the amount of such payment ought to be calculated.

Clauson, for the summons.

P. F. Wheeler, for the tenant for life. Where real estate is devised to trustees upon trust to sell and to hold the proceeds in trust for persons in succession the tenant for life for the time being is entitled to the income in specie of the real estate until sale: *Casamajor* v. *Strode*. (1) That case has never been questioned. It is true that in the present case both real and personal estate are given to the trustees on trust for sale so as to constitute a mixed fund, but that fact does not, it is submitted, affect the right of the tenant for life to receive the rents of the real estate until sale.

[He was stopped.]

Cave, K.C., and *G. R. Northcote*, for persons entitled in remainder. The tenant for life is not entitled to the rents of the real estate in specie, but only to 3 per cent. on its estimated value. Where income-producing property is directed by a testator to be converted, the rule is to put a value on it and to allow the tenant for life out of the income actually produced a sum equal to 3 per cent. on such value: *Wentworth* v. *Wentworth* (2); *Meyer* v. *Simonsen* (3); *Brown* v. *Gellatly* (4); *In re Woods* (5); *Yates* v. *Yates*. (6) In *Wentworth* v. *Wentworth* (2) Lord Macnaghten states the rule quite generally as applying

(1) (1809) 19 Ves. 390, n.
(2) [1900] A. C. 163, 171.
(3) (1852) 5 De G. & Sm. 723.
(4) (1867) L. R. 2 Ch. 751.
(5) [1904] 2 Ch. 4.
(6) (1860) 28 Beav. 687.

WARRINGTON J. 1908 OLIVER, *In re.* WILSON *v.* OLIVER.

equally to the case of real and personal estate. The reason of the rule is that the beneficiaries ought to be placed in the position in which they would be if the testator's directions as to conversion and investment had been actually carried into effect.

If, however, a different rule is to be adopted in the case of real estate given alone, yet the personalty rule is applicable where, as here, the real and personal estate are given so as to constitute a mixed fund: *Genery* v. *Fitzgerald.* (1)

[WARRINGTON J. *Bellairs* v. *Bellairs* (2) is a stronger case in your favour than *Genery* v. *Fitzgerald.* (1)]

The same gift cannot be construed in one way as to realty and in another as to personalty: *In re Dumble.* (3)

[WARRINGTON J. What I have to determine is the rule binding the Court in administering the estate. It is not a question of construction at all.]

The Court ought not, it is submitted, to extend the somewhat anomalous rule laid down in *Casamajor* v. *Strode.* (4) In *In re Searle* (5), which will no doubt be relied on on behalf of the tenant for life, *Genery* v. *Fitzgerald* (1) was not cited.

[WARRINGTON J. referred to *Hope* v. *D'Hédouville.* (6)]

That decision followed *Casamajor* v. *Strode* (4), and does not apply to the case of a mixed fund.

S. Dickinson, for another person entitled in remainder, supported the same contention.

P. F. Wheeler, in reply. *Wentworth* v. *Wentworth* (7) was a decision of the Privy Council, and is therefore not binding on this Court; and, although the Court will treat the dictum of Lord Macnaghten with respect, it will nevertheless be bound by *Casamajor* v. *Strode.* (4) *Wentworth* v. *Wentworth* (7) was an entirely different case from the present. It was a case of mining property, and therefore of a wasting nature, as was pointed out in *In re Ridge.* (8) *Genery* v. *Fitzgerald* (1) merely decided that where realty and personalty are given together the income of both go together; the feudal rule as to realty being excluded by

(1) Jac. 468.
(2) L. R. 18 Eq. 510.
(3) (1883) 23 Ch. D. 360.
(4) 19 Ves. 390, n.
(5) [1900] 2 Ch. 829.
(6) [1893] 2 Ch. 361.
(7) [1900] A. C. 163.
(8) (1885) 31 Ch. D. 504, 508.

the fact of the properties being blended: *In re Burton's Will.* (1) *Genery* v. *Fitzgerald* (2) has therefore no application to the present case.

[WARRINGTON J. What do you say to the statement by Sir George Jessel in *Bellairs* v. *Bellairs* (3), to the effect that the general rule is that a mixed fund is governed by the rule, as to personalty?]

That was merely a dictum, and it requires something more than that to overrule *In re Searle* (4), *Hope* v. *D'Hédouville* (5), and *In re Earl of Darnley.* (6)

[He also referred to *In re Laing's Trusts* (7); *In re Carter.* (8)]

Cur. adv. vult.

May 4. WARRINGTON J. read the following judgment:—The question in this case is whether the defendant Mary Oliver, the tenant for life under the testator's will, is entitled to the rents of certain unsold real estate or whether such real estate ought to be valued and interest on such value paid to her. [His Lordship stated the facts, observing that the unsold real estate had been properly retained unconverted in the interests of the several beneficiaries. He continued:—] On these facts the question I have stated arises.

In the case of a simple devise of real estate in trust for sale where the proceeds are to be held for several in succession, I think it is settled that until sale the tenant for life is entitled to the rents and profits: *Casamajor* v. *Strode* (9); *Hope* v. *D'Hédouville.* (5) On the other hand, in the case of a similar bequest of personal estate, the tenant for life would not be entitled to the income of the estate in specie, so far as it is not derived from authorized investments, but would be entitled to a sum representing interest at a fixed rate on the value.

It has indeed been argued that there is no such distinction between real and personal estate, but that the rule as to

(1) [1892] 2 Ch. 38, 44.
(2) Jac. 468.
(3) L. R. 18 Eq. 510.
(4) [1900] 2 Ch. 829.
(5) [1893] 2 Ch. 361.
(6) [1907] 1 Ch. 159.
(7) (1866) L. R. 1 Eq. 416.
(8) (1892) 41 W. R. 140.
(9) 19 Ves. 390, n.

WARRINGTON J.
1908
OLIVER, *In re.*
WILSON *v.* OLIVER.

personalty is universal in its application, and in support of this argument reliance is placed on a passage in the judgment of Lord Macnaghten in *Wentworth* v. *Wentworth.* (1) That passage is as follows: "In this country, in the case of income-producing property directed by will to be converted, but retained for a time unconverted for the benefit of the estate, it has been the practice of the Court to put a value on the property, and to allow the tenant for life out of the income actually produced a sum equal to 4 per cent. on such value. That was the rule laid down by Parker V.-C. in *Meyer* v. *Simonsen* (2) and followed by Lord Cairns in *Brown* v. *Gellatly.* (3)" But the subject-matter of that case was mining property, and the question which the Privy Council had to determine was not whether the tenant for life was entitled to the mining rents in specie—for to them she was, of course, not entitled—but in what manner her interest was to be ascertained. The Court below had given her only the income of the mining rents when invested. This the Privy Council thought unfair to her and gave her interest on the value of the estate. What might have been her rights as to the ordinary rents and profits of real estate was not considered, nor was either *Casamajor* v. *Strode* (4) or *Hope* v. *D'Hédouville* (5) cited; and I do not think under the circumstances that I can regard the passage I have quoted from *Wentworth* v. *Wentworth* (1) as overruling the express decisions above mentioned.

But in this case the real and personal estate are devised and bequeathed together, and the proceeds of both are to be held as one fund, and it is contended that in such a case the rules regulating personal estate ought to prevail. Against this contention there are two express decisions of a judge of co-ordinate authority which are binding on me, unless it can be shewn that there are other decisions which are directly in conflict with them, or that they are contrary to some established principle of law. The two decisions I refer to are those in *In re Searle* (6) and *In re Earl of Darnley.* (7) In the first of these cases Kekewich J. after

(1) [1900] A. C. 171.
(2) 5 De G. & Sm. 723.
(3) L. R. 2 Ch. 751.
(4) 19 Ves. 390, n.
(5) [1893] 2 Ch. 361.
(6) [1900] 2 Ch. 829.
(7) [1907] 1 Ch. 159.

argument reviewed the cases on the subject, and held that there is in law the distinction I have mentioned between realty and personalty, and that this distinction exists notwithstanding that they are both comprised in a single trust for conversion. This, therefore, is a case directly in point. In the second case the same learned judge followed his previous decision, and it is of importance only because in it *Wentworth* v. *Wentworth* (1) was cited. There is no express decision to the contrary, but it is said that there is an established principle that where realty and personalty are combined in one fund rules relating to personalty will be applied to both constituents of such fund, and that the decisions I have mentioned are inconsistent with that principle and therefore ought not to be followed. But the answer, I think, is that no such general principle has been established. Reliance is placed on *Genery* v. *Fitzgerald* (2) and *Bellairs* v. *Bellairs*. (3) The first of these related to intermediate rents of real estate devised so as to vest at a future time, and the second to conditions subsequent in restraint of marriage. In both the effect of applying different rules to the two classes of property would have been to give the beneficial interest in the two classes to different persons though they were comprised in the same gift, and this, I think, is the true ground of decisions of that class. The strongest expression of opinion in favour of the supposed general principle is that of Sir George Jessel in *Bellairs* v. *Bellairs*. (3) He says (4): "But there is another ground upon which again I am bound by authority. This is a mixed fund; the proceeds of realty and personalty directed to be converted are thrown together as an entire fund. Now the rules as to mixed funds are very different from the rules governing simple funds, arising from one or the other kind of property. The general rule in modern times has been to govern this mixed fund by the rules of personalty, and in some cases it has been carried so far that even where the only mixture, so to say, was giving the funds to the same objects, that has been carried out. The case of *Genery* v. *Fitzgerald* (2) is a notable example. That was not the case of a true mixed fund, but a simple gift of realty and

(1) [1900] A. C. 163.
(2) Jac. 468.
(3) L. R. 18 Eq. 510.
(4) *Ibid.* 516.

WARRINGTON J.
1908
OLIVER, *In re.*
WILSON *v.* OLIVER.

personalty to the same object. When we come to true mixed funds we find the law has been largely modified in favour of the rules regulating personal estate, as is shewn by the decisions in the well-known cases of *Roberts* v. *Walker* (1), *Boughton* v. *Boughton* (2), and *Tench* v. *Cheese.* (3) Therefore, if it depended simply on this consideration, I should be bound to hold that, having a mixed fund, you are not to sever it into two, and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate apply." I think the key to this is to be found in the words "the two funds are to be kept together," and that the passage was not intended to have the general application contended for. No such general principle as is contended for has, in my opinion, been established. There is no question here of keeping the two funds together, and no difficulty in applying one rule to the rents of realty and another to the income of personalty, any more than there would be in giving the tenant for life income in specie of authorized investments and some conventional sum in lieu of income of unauthorized investments.

On the whole I must follow *In re Searle* (4) and *In re Earl of Darnley* (5) and declare that Mary Oliver is entitled to the rents of the unsold real estate.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Green & Son, Howden; Petch & Co., for Burland & Macturk, South Cave, East Yorks.; Steavenson & Couldwell, for W. Austin, Hull.*

(1) (1830) 1 Russ. & My. 752.
(2) (1848) 1 H. L. C. 406.
(3) (1855) 6 D. M. & G. 453.
(4) [1900] 2 Ch. 829.
(5) [1907] 1 Ch. 159.

W. I. C.

ANDERSON *v.* WANDSWORTH BOROUGH COUNCIL.

NEVILLE J.

1908

April 28, 29.

[1907 A. 473.]

Burial Fees—Public Burial Ground—Fees other than for Services rendered—Burial Act, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-s.* 4.

At the time of the passing of the Burial Act, 1900, the parish of Tooting Graveney possessed an old churchyard still open for burials, and the rector was entitled to charge in respect of such burials "fees other than for services rendered." This parish and four others had by virtue of the London Government Act, 1899, and schemes made thereunder been formed into the borough of Wandsworth and united for civil purposes into one parish called the parish of Wandsworth Borough. At the time of the union all the parishes except Tooting Graveney had adopted the Burial Acts, and three of them had separate public burial grounds provided under those Acts and used by their own parishioners only. The scheme of union provided that the Burial Acts should be in force and be administered by the borough council uniformly throughout the borough. After the union the three public burial grounds above mentioned were used for the whole borough, and parishioners of Tooting Graveney were from time to time buried there. The rector or his representative officiated at these burials, and he claimed to be entitled to the same fees as were paid in the churchyard:—

Held, that the rector had not at the time of the passing of the Act been entitled to any fees in respect of any matter arising in the three public burial grounds, and therefore the proviso in s. 3, sub-s. 4, of the Burial Act, 1900, did not apply and the "fees other than for services rendered" were not payable.

Special Case.

Before the passing of the London Government Act, 1899, the parish of St. Nicholas, Tooting, commonly called Tooting Graveney, had been united with the parishes of Clapham, Streatham, Wandsworth, and Putney to form the Wandsworth district under the control of the Wandsworth District Council. Until the passing of that Act and of the Burial Act, 1900, the Burial Acts were not in force in the parish of Tooting Graveney. The old parish churchyard had been extended from time to time and was still open. It had never been maintained by, or under the control of, a burial board.

At the time of the passing of the Burial Act, 1900, fees were payable to the rector of the parish of Tooting Graveney in

NEVILLE J. 1908 ANDERSON v. WANDSWORTH BOROUGH COUNCIL.

respect of matters arising in the churchyard and the additions thereto, but not in any other burial ground. Such fees consisted both of fees for services rendered and of fees other than for services rendered, namely, fees for breaking the ground, for the erection of monuments, and for the sale and opening of vaults.

The Burial Acts had been adopted in all the other four parishes. Burial grounds known as the Putney Vale Cemetery, the Earlsfield Cemetery, and the Garratt Lane Cemetery had been provided for the parishes of Putney, Wandsworth, and Streatham respectively, and until the passing of the Burial Act, 1900, were used as the separate burial grounds for the said parishes respectively. The burial board of Clapham had contracted with the owners of the Norwood Cemetery for the interment there of persons dying in the parish. Certain payments had been made under the Burial Act, 1852, to the rectors of these parishes as compensation for burial fees, including fees other than for services rendered.

By the London Government Act, 1899, the vestry of Tooting Graveney and the Wandsworth District Council were abolished and their powers vested in the Wandsworth Borough Council; and by virtue of that Act and the London (Adoptive Acts) Scheme, 1902, the burial boards were abolished and the borough council became the authority for administering the Burial Acts in the district.

By the Borough of Wandsworth (Union of Parishes) Scheme, 1903, made in pursuance of the provisions of the London Government Act, 1899, which came into force on April 1, 1904, it was provided that the parishes of Wandsworth, Putney, Clapham, Streatham, and Tooting Graveney should, for all civil purposes, be united together and form one parish to be known as the parish of Wandsworth Borough. Sect. 2 of that scheme was as follows: "The Burial Acts 1852 to 1900 shall be in force throughout the borough and shall be administered by the borough council uniformly throughout the borough and the borough shall form a single district for the purposes of those Acts." After this scheme came into operation the three public burial grounds above mentioned were used for the inhabitants of all the five old parishes, and, though the churchyard of Tooting

Graveney was still open, burials of the inhabitants residing in that parish from time to time took place in one or other of the said public burial grounds. The rector or his representative officiated at such burials, and he claimed to be entitled to be paid by the council all the fees which he had formerly received for burials in the old churchyard, including those other than for services rendered. The borough council paid fees for the performance of the Burial Service, but refused to pay the others. The rector brought this action claiming these fees, and this special case was stated under the Rules of the Supreme Court, Order xxxiv., to raise the point of law whether they were payable. (1)

Montague Barlow, for the plaintiff. Under the Burials Act, 1852 (15 & 16 Vict. c. 85), the incumbent was entitled to receive the same fees in the case of burials of his own parishioners as he received before the Act, whether for services rendered or otherwise. That is repealed by the Act of 1900 so far as new burial

(1) The section of the Burial Act, 1900, upon which the question depended is as follows:—

Sect. 3: "(4.) Subject to the provisions of this section, no fee shall be payable to any incumbent of a parish in respect of any right of exclusive burial, or the erection of a monument, or any other matter whatsoever, in any burial ground maintained by a burial authority, except for services rendered by him, and this enactment shall apply to any such fee which is by law or custom payable to the churchwardens of any parish or to trustees or other persons for any parochial purpose, or for the discharge of any debt or liability, in like manner as it applies to fees payable to an incumbent.

"Provided as follows:—

"(i.) Where, at the passing of this Act, fees other than for services rendered are payable in respect of any matter arising in any burial ground attached to or used for the purposes of a parish, and laid out and used before the passing of this Act, the like fees shall continue to be paid during the incumbency of the person who, at the passing of this Act, is the incumbent of the parish, or during a period of fifteen years from the passing of this Act, whichever is longer, or if the fees are not paid to the incumbent, or to any person claiming through or under him, then during the said period of fifteen years, and shall be applicable to the like purposes as heretofore, and the burial authority shall collect and pay these fees in like manner as the fees to be paid for services rendered."

NEVILLE J. 1908 ANDERSON v. WANDSWORTH BOROUGH COUNCIL.

grounds are concerned, but the incumbent's rights are kept alive, as to existing arrangements, for existing incumbencies or fifteen years. The case is within the proviso in s. 3, sub-s. 4. Wandsworth Borough is a parish within the meaning of the Act of 1852. When such a parish contains more than one old parish the incumbent of each is bound to perform the service for parishioners of his old parish, and is entitled to the fees payable: *Day* v. *Peacock*. (1) The London Government Act, 1899 (62 & 63 Vict. c. 14), and the schemes under it, changed the burial authority, but did not change the rights. The rector of Tooting Graveney, being the incumbent of one of the parishes making up the parish of Wandsworth Borough, is the incumbent referred to in the proviso, or if not he is one of the other persons to whom fees are payable whose rights are reserved by the proviso. In *Young* v. *Kingston-on-Thames, &c., Joint Burials Committee* (2) the claim to fees failed because there was not, in the opinion of the Court, at the date of the passing of the Act, a burial ground in which fees could be earned in existence. Here there is no question that these three burial grounds were in existence. Commutations for similar fees have been paid to other incumbents who were entitled to them in their old parishes. The rector has the same duties and ought to have the same rights.

Horace Avory, K.C., and *Brooke Little*, for the council, were not called upon.

Neville J. Under the Act of 1852 the incumbent of a parish was entitled to certain fees other than fees for services rendered upon the interment of the bodies of his parishioners in burial grounds provided by the burial boards constituted under that Act. By the London Government Act of 1899 the powers of the burial boards were vested in the borough councils.

The Burial Act of 1900, s. 3, sub-s. 4, enacts that no fee shall be payable to any incumbent in respect of any right of exclusive burial or the erection of a monument, or any other matter whatsoever, in any burial ground maintained by a burial authority, except for services rendered by him, provided that, where, at the passing of the Act, fees other than for services rendered are payable in

(1) (1865) 18 C. B. (N.S.) 702. (2) [1907] 1 K. B. 416.

respect of any matter arising in any burial ground attached to or used for the purposes of a parish, and laid out and used before the passing of the Act, the like fees shall continue to be paid during the incumbency of the person who, at the passing of the Act, is the incumbent of the parish, or during a period of fifteen years from the passing of the Act, whichever is longer. Then the rest of the section deals with the case of fees not payable to the incumbent. There were, at the date of the passing of the Act of 1900, certain burial grounds used for the purposes of certain parishes within the borough of Wandsworth other than the parish of Tooting Graveney, of which the plaintiff is incumbent, and I will assume that after the passing of the Act of 1900 these burial grounds were burial grounds provided for the parish of Tooting Graveney, together with the other parishes, by virtue of the schemes of 1902 and 1903, or one of them. Upon that assumption it is contended by the plaintiff that, notwithstanding the Act of 1900, he is entitled to fees other than those for services rendered by him in respect of interments of the remains of his parishioners in such burial grounds, the argument being that, the burial grounds being attached to a parish, although not to the parish of which he is incumbent, he is entitled to such fees by virtue of the first proviso of sub-s. 4. In my opinion this proviso is intended to preserve rights already existing, but not to create new rights, and merely reserves to the persons entitled at the passing of the Act the right to the fees in respect of any matter arising in the burial ground payable to the incumbent of the parish to which the burial ground is attached.

The plaintiff here had no right to fees in respect of interments in this burial ground at the passing of the Act of 1900; and such part of the Act of 1852 as would have given him fees other than for services rendered has been repealed by the operation of the Act of 1900. As I have said, I do not think the proviso was intended to confer any right to fees not already existing. The answer to the special case must be that the plaintiff is not entitled to any fees other than for services rendered.

Solicitors: *G. R. Grant; W. W. Young.*

J. R. B.

EVE J.

1908

March 4, 5, 10, 11, 12, 15, 17, 18, 19, 24.

In re ALBERT BAKER & CO.'S APPLICATION.

In re AERATED BREAD COMPANY'S APPLICATION.

Trade Mark—Registration—Same Goods or Description of Goods—Nearly identical Trade Marks—"A. B. C."—Matter common to Trade—Honest concurrent User—Matter calculated to deceive—Disclaimer—Discretion of Court—Trade Marks Act, 1905 (*5 Edw. 7, c. 15*), *ss.* 11, 14, 15, 20, 21—*Limited Company's Trade Mark—Name or Signature—Advertisements—Companies Act*, 1862 (*25 & 26 Vict. c.* 89), *s.* 41.

In 1906 the Aerated Bread Company applied to register as a trade mark in class 45, in respect of cigars, cigarettes, and tobacco, a device which was a reproduction of the company's common seal having the letters A. B. C. in the centre, and which was already registered as their trade mark in class 42 in respect of bread, biscuits, cakes, and flour. Shortly afterwards A. Baker & Co., who carried on business as tobacconists, applied to register a series of four labels as trade marks in class 45 in respect of cigarettes. One of the distinguishing features in the series was a circular band or garter in the centre of which appeared the letters A. B. C. and round the edge of which were contained the words "A. Baker & Co. Ld." A. Baker & Co. had for the last eleven years used the mark they sought to register and with perfect good faith claimed the right to the exclusive user of the letters "A. B. C." The Aerated Bread Company opposed A. Baker & Co.'s application on the ground that there had been concurrent user of the letters A. B. C. by themselves and others, and that A. Baker & Co.'s labels should only be registered on a disclaimer by them of any right to the exclusive use of that part of the label. A. Baker & Co. opposed the Aerated Bread Company's application on the ground that their mark contained matter the use of which would, by reason of its being calculated to deceive, be disentitled to protection in a Court of justice. The registrar refused to register either mark, and thereupon each company applied to the Court for a direction to the registrar to proceed with the registration of their respective marks. At the hearing, A. Baker & Co. failed to establish that the letters A. B. C. exclusively indicated their goods. The evidence also shewed that in the past the concurrent user of the letters A. B. C. for the same goods by the Aerated Bread Company, A. Baker & Co., and others had not led to any mistake, confusion, or complaint.

On A. Baker's & Co.'s application:—

Held, that in the circumstances the Court, in the exercise of its discretion under s. 15 of the Trade Marks Act, 1905, would not impose upon the applicants a condition requiring them to disclaim any part of their combination although containing matter common to the trade, and that they were entitled to have their trade marks registered.

The condition of disclaimer is one for the imposition of which some good reason ought to be established rather than one which ought to be imposed unless some good reason to the contrary is made out.

The failure of a claim to a monopoly, put forward and asserted with good faith, does not necessarily involve the imposition of a disclaimer as a condition of registration.

Held, also, that the applicants' trade marks were not "advertisements" within the meaning of s. 41 of the Companies Act, 1862, necessitating the mention thereon of the applicant company's name in legible characters; and that there is nothing in the Trade Marks Act, 1905, confining the name or signature appearing in a trade mark to the name or signature of the applicant.

On the Aerated Bread Company's application:—

Held, that the applicants had discharged the burden which lay upon them of shewing that their trade mark was not calculated to deceive, and that they were entitled to have their mark registered in class 45.

MOTIONS.

These were two applications—the first by Albert Baker & Co. (1898), Limited, that the Registrar of Trade Marks might be directed to proceed with their application for the registration of a trade mark No. 284,766, and that the respondents the Aerated Bread Company, Limited, might be ordered to pay the costs of that application and their opposition; and the second by the Aerated Bread Company, Limited (hereinafter referred to as the bread company), that the registrar might be directed to proceed with their application for the registration of a trade mark No. 282,213, and that the respondents Albert Baker & Co. (1898), Limited (hereinafter referred to as Baker & Co.), might be ordered to pay the costs of that application and their opposition.

The following statement of facts is taken from his Lordship's judgment:—

"On April 17, 1906, the Aerated Bread Company Limited, applied to register as a trade mark in class 45, in respect of cigars, cigarettes, and tobacco, a device which is a reproduction of the company's common seal. The identical device is already registered as the bread company's trade mark in class 42 in respect of bread, biscuits, cakes, and flour. In their application to register in class 45 the bread company expressed their willingness to disclaim any right to the exclusive use of the letters A. B. C., and this attitude they have consistently maintained throughout the proceedings.

EVE J.
1908
ALBERT BAKER & CO.'S APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

"On July 20, 1906, Albert Baker & Co. (1898), Limited, under the misnomer of Albert Baker & Co., Limited, applied to register a series of four wrappers or labels as trade marks in class 45 in respect of cigarettes. One of the distinguishing features in this series is a circular band or garter in the centre of which appear the letters A. B. C. and round the edge of which are contained the words 'A. Baker & Co., Ld.'

"In due course the marks so applied for were respectively advertised in the *Trade Marks Journal* of July 4 and December 5, 1906.

"On August 3, 1906, Baker & Co. gave notice of their intention to oppose the registration of the bread company's mark, and on December 17, 1906, the bread company gave a similar notice in respect of Baker & Co.'s marks.

"Numerous declarations in support of the respective oppositions and in reply were filed, and ultimately the two applications and the cross oppositions came before the learned registrar, and on February 26, 1907, acting under s. 20 of the Trade Marks Act, 1905, he declined to proceed with either application until the rights of the applicants and opponents have been determined by the Court.

"On March 14, 1907, Baker & Co., proceeding under s. 14 of the Act, served notice of motion on the bread company and the registrar asking that the registrar might be ordered to proceed with the registration of their mark, and on April 16, 1907, the bread company followed suit with a notice of motion served on Baker & Co. and the registrar asking that the registrar might be ordered to proceed with the registration of their mark. The moving parties in each case ask that their opponent may be ordered to pay the costs of and incident to the application and to the opposition.

"By an order made by Kekewich J. on April 19, 1907, it was ordered that both motions should be set down in the witness list and be heard together on the statutory declarations used before the registrar, with liberty to either party to cross-examine any deponent upon notice and to produce further oral evidence.

"Under a further order of July 18, 1907, the bread company

obtained leave to adduce certain further grounds of objection to Baker & Co.'s registration.

"In these circumstances the motions have now come on to be heard, and it falls to me to determine what are the respective rights of the parties.

"The following is a brief outline of the history of the two contending parties so far as it is material on this occasion.

"The bread company were incorporated in the year 1862 with the object of manufacturing and selling bread, flour, biscuits, and farinaceous compounds and materials; of constructing and acquiring mills, shops, machinery, and appliances suitable for such manufacture or sale; of acquiring and using patent rights connected with such manufacture; and, generally, of carrying on any trade, business, or operation in furtherance of or connected with such objects or analogous thereto.

"At first the bread company's business was restricted to the manufacture and sale of bread, but from about the year 1875 the company began to develop a tea or refreshment room class of business, and by the year 1879, when Mr. George Edwards, the present chairman of the company, first became associated with it, the company had close on fifty shops, the majority of which were being used as tea and refreshment shops. This number has gone on increasing, and there are now 122 or 123 shops, and the large majority of these are used as tea and refreshment shops.

"In 1886 the company found it necessary to assign a part of some of their shops for smokers, and in the following year this practice had to be, and was in fact, extended practically to all their shops, but down to the year 1894 smokers provided their own tobacco, cigars, and cigarettes, and the company dealt in none of those articles.

"In 1894 and 1895 the company obtained licences for the sale of tobacco at all their establishments, and from the time when such licences were obtained down to April, 1899, the company purchased cigarettes exclusively from a company known first as the Automatic Box Company, Limited, and later on as the New Automatic Box Company, Limited. These cigarettes, of which 54,000 were purchased in 1895, and 92,000 odd in 1898, were purchased in boxes of 100 each, and were placed by the bread company in

EVE J. 1908

ALBERT BAKER & CO.'S APPLICATION, *In re.*

AERATED BREAD COMPANY'S APPLICATION, *In re.*

automatic machines from which customers could help themselves on unlocking the machine by the insertion of a penny.

"All the cigarettes supplied by the Automatic and the New Automatic Box Companies to the bread company bore the letters 'A. B. Co. Ld.' upon them, the Turkish in gilt letters and the Virginian in plain printing.

"In April, 1899, the bread company ceased to obtain cigarettes from the box company and transferred their exclusive custom to Messrs. Lambert & Butler, from whom they obtained Turkish and Virginian cigarettes. These cigarettes were stamped in gold, with a crescent and star in the one case, and with a flag containing stars and stripes in the other, and on each cigarette there appeared in gold lettering the words 'Aerated Bread Co. Ld.' These again were supplied to the bread company in boxes containing 100 each and were all fed into the automatic machines, except that possibly now and again a box of 100 may have been sold to a customer. During the time the bread company were dealing exclusively with Lambert & Butler the sale of cigarettes averaged a little over 100,000 per annum.

"In 1901 the bread company commenced to sell cigars. These also were obtained from Lambert & Butler in boxes of twenty-five and fifty and were sold singly or in small quantities at the bread company's shops. The sale of cigars was 6850 in 1901 and had risen to 56,600 in 1903.

"Towards the end of 1903 the company made another change in the source from which they obtained their cigarettes, and in that or the succeeding year the company first commenced selling cigarettes otherwise than through the automatic boxes. In order to meet the requirements of this new method of sale the cigarettes were obtained from a firm named Levartovsky in boxes and packets of ten, the former containing Turkish and the latter Virginian cigarettes.

"Specimens of these boxes and packets are exhibits A.F.B.1 and A.F.B.2, and according to the evidence the cigarettes supplied to the company by Levartovsky in tens have always been and are still being sold in similar boxes and packets. Side by side with this sale in packets of ten the sale of single

cigarettes by means of the automatic boxes has been continued, the cigarettes for this latter purpose being supplied also by Levartovsky in boxes of 100 each. On each of the cigarettes sold, whether sold in boxes or packets of ten, or singly through the automatic machine, the name of the bread company without the word limited appears.

"In passing, I point out that on A.F.B.1 and A.F.B.2 the letters A. B. C. prominently appear.

"Early in 1906 the bread company determined to embark in the tobacco business, and with this view allocated and partitioned off a part of several of their tea and refreshment shops and converted the part so partitioned off into a tobacconist's shop. This action on the part of the bread company naturally attracted the attention of Baker & Co., and a good deal of evidence has been produced before me with a view of shewing that the bread company have copied the arrangement or get-up of Baker & Co.'s shops, and thereby been guilty of conduct calculated to create confusion in the public mind and possibly to divert custom from Baker & Co. to themselves.

"I have, however, nothing to do with this issue, and I dismiss the matter once for all by saying that it has been vigorously asserted on the one side and as vigorously repudiated on the other.

"There are only two observations I must make before concluding my history of the bread company, and they are, first, that it is freely admitted that the bread company have come to be known in the bread and refreshment trades, and by the public in connection with these trades, as the A. B. C., and, secondly, that it has been proved that the company have made a very long and very large use of that abbreviation in connection with the sale of bread, cakes, tea, coffee, chocolate, cocoa, and other articles of food.

"I turn now to review in like manner the history of Baker & Co.

"Prior to the year 1893 there were two firms carrying on business as tobacconists in which members of the de Meza family were interested—the one J. de Meza & Sons, which consisted of Mr. Nathaniel de Meza (a present director of Baker

EVE J. 1908 ALBERT BAKER & Co.'s APPLICATION, *In re.* AERATED BREAD COMPANY'S APPLICATION, *In re.*

& Co.) and his father, and the other known as Morris de Meza and carried on by a gentleman of that name, a brother of Mr. Nathaniel de Meza.

"In 1893 Mr. Morris de Meza started a new venture as Alfred Baker & Co., and in connection with that business he first used the letters A. B. C. According to Mr. Nathaniel de Meza, Morris de Meza used the letters very generally in connection with Alfred Baker & Co.'s business; indeed he says the name was selected so as to be abbreviated into A. B. C.

"In 1895 Mr. de Meza senior and his sons Nathaniel and Morris joined forces and registered a company under the title of A. Baker & Co., Limited, and this company in due course acquired the businesses of J. de Meza & Son and of Alfred Baker & Co., which were then being carried on in eight different shops.

"To all of these shops the name of A. Baker & Co., Limited, was attached.

"In 1898, by which time the number of shops carried on under the name of A. Baker & Co., Limited, had increased to twenty-two, the present company of Albert Baker & Co. (1898), Limited, were incorporated and took over the assets of A. Baker & Co., Limited, although as a matter of fact the last-named company was not formally wound up until October, 1907.

"Under the present company's management the number of shops has greatly increased, and there are now fifty-one situate in all parts of the metropolis.

"There can be no doubt that from an early date the successive proprietors of the Baker shops have sought to identify the letters A. B. C. with their shops and the goods sold there.

"At the company's headquarters in Holloway Road there have been displayed since 1897, in a very prominent position on the front of the premises, the letters A. B. C. in large size, and at forty out of the present fifty-one shops Mr. de Meza states those letters, or monograms embodying those letters, are to be found. Photographs have been put in shewing the letters displayed on the lamps and other prominent parts of the premises.

"With regard to the use of the letters in connection with their goods Baker & Co. have used showcards and window tickets—

specimens of which constitute the exhibit NM5 to Mr. de Meza's deposition of October 17, 1906—in which these letters prominently appear, not as distinguishing any particular goods, but for the most part as laudatory of the good value represented in A. B. C.'s goods. They have also stamped them conspicuously on a number of labels, boxes, and wrappers, some at least of which have been in use continuously since 1895, and which include three out of the four labels which they are now seeking to register, and on other labels and boxes which have been introduced at various dates subsequent to 1895, and they have further stamped them on some of the pipes and cigarette and cigar holders sold by them, or on the cases in which the same are sold. Nor must I forget to mention that the letters without the addition of the apostrophe ' 's ' appear on some of the eight cigarettes comprising the exhibit NM4, and that as regards one of those cigarettes—the special Virginia—its sale dates back to 1893.

" On the other hand, the letters never formed part of any trade marks acquired from the de Mezas or Alfred Baker & Co., nor have they been included in any of the thirty-eight trade marks which have been registered by the two limited companies between April, 1897, and June, 1906; and Baker & Co.'s own catalogues for 1900, 1903, and 1906—the only three published during the period 1900 to 1906—disclose a very limited use of the letters in connection with the goods therein enumerated, although each of the two later catalogues bears on the outside the three letters in a monogram form, and on the earlier one is a picture of the head office in Holloway Road, whereon, as I have already said, the three letters are very conspicuously displayed.

" The foregoing facts relative to the history of the rival traders I have collated from those parts of the evidence before me, about which there is no serious dispute."

The original grounds of the bread company's opposition to Baker & Co.'s application were mainly as follows: That the bread company and the goods sold by them had been known to the public for many years as " the A. B. C." and as A. B. C. goods; that in 1894 they began to sell cigarettes marked either with the bread company's name or " A. B. Co. Ld.," and since

EVE J.
1908
ALBERT BAKER & Co.'s APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

1903 they had sold boxes and packets of cigarettes on which were "A. B. C. Turkish Cigarettes" or "A. B. C. Virginia Cigarettes," together with the mark which was the subject of their application No. 282,213, except that the name of the bread company was omitted; and that their trade mark was registered in class 42.

The grounds upon which Baker & Co. relied in support of their application were mainly as follows:—That they had used continuously since 1895 the label which they were now seeking to register, and during the whole of that period the letters A. B. C. had appeared upon the label; that they were known in the tobacco trade as "A. B. C.," and they and their goods were known to their customers and the public as A. B. C.; and they did not admit the bread company's statement relating to the sale of their cigarettes.

In pursuance of an order dated July 8, 1907, the bread company took the following further grounds:—(1.) That each of Baker & Co.'s four labels contained the name "A. Baker & Co., Limited," the user of which name by any other company than A. Baker & Co., Limited, contravened the provisions of ss. 41 and 42 of the Companies Act, 1862; (2.) that each of the labels set out the reproduction of a written signature "A. Baker & Co.," whereas a limited company could have no signature; (3.) that there was no company registered as "Albert Baker & Co., Limited," although the applicants were so described; (4.) that the applicants had contravened the provisions of ss. 41 and 42 of the Companies Act, 1862, in not having their name painted or affixed outside their office, 65, Holloway Road, London, N., or their places of business, or in notices, advertisements, official publications, bills, invoices, or receipts; (5.) that Albert Baker & Co. (1898), Limited, were not entitled to be described under the name "A. Baker & Co., Limited"; (6.) that the labels contained matters common to the tobacco trade, or otherwise of a non-distinctive character; and (7.) that the bread company were the proprietors of the three trade marks therein specified consisting of or containing the letters "A. B. C."

The following were the grounds of opposition by Baker & Co. to the application No. 282,213 by the bread company:—(1.) That

Baker & Co. were wholesale and retail tobacco merchants and manufacturers, and their business was established by their predecessors in the year 1895, and they had traded first as "A. Baker & Co., Limited," from the year 1895 up to 1898, and since then as "Albert Baker & Co., Limited"; (2.) that trading as "Albert Baker & Co., Limited," and previously as "A. Baker & Co., Limited," they had for eleven years last past continuously used this particular device as a trade mark on their packets of tobacco and cigarettes, and that device was well known to the public and to the trade as denoting their goods, and they had likewise employed the letters "A. B. C." displayed in a very prominent manner upon their premises; (3.) that they were well known amongst the trade and the public as A. B. C.; (4.) that the bread company's proposed trade mark had such resemblance to Baker & Co.'s mark as to be calculated to deceive when used in connection with the sale of tobacco and cigarettes, and goods of that kind, marked with the bread company's mark, were likely and liable to be confused with Baker & Co.'s goods; and (5.) that Baker & Co. had applied to register their labels of which the letters "A. B. C." were a prominent feature.

The bread company thereupon gave notice of the grounds on which they relied as supporting their application, and which were precisely similar to the grounds of their opposition to Baker & Co.'s application No. 284,766 hereinbefore set out, with the addition that the bread company stated that the trade mark they were applying to register was a copy of their seal, and that since 1903 they had sold more than 226,000 in boxes or packets marked as set forth, and the bread company also admitted the allegations in paragraph 1 of Baker & Co.'s notice of opposition.

At the hearing, the declarations on either side were read and the deponents cross-examined.

P. O. Lawrence, K.C., and *Sebastian*, for Baker & Co.'s application. We seek to register this series of four labels for cigarettes, the letters A. B. C. thereon having been used by these applicants in the trade for eleven years previous to 1906, and we submit that the respondents the bread company ought not to be permitted

EVE J.
1908
ALBERT BAKER & CO.'S APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

to register their mark, because it would create confusion and be calculated to deceive.

The case comes under the words "any other distinctive mark" in s. 9, sub-s. 5, of the Trade Marks Act, 1905. That section also defines what the word "distinctive" means, namely, "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." Where several persons seek to have identical marks registered, the registrar, in accordance with s. 20 of the Act, may refuse to register any until the rights of the respective claimants are determined. This present application is made under s. 14 of the Act and is an appeal from the refusal of the registrar to proceed. A similar course was pursued in *In re Hudson's Application.* (1)

The mark has been passed by the registrar and is a registrable mark, but the bread company claim that it will interfere with their business and stop them using the letters A. B. C., and that a disclaimer of the exclusive right to use those letters should be made by these applicants. We are entitled to be registered without any such disclaimer.

Under the old Acts the letters A. B. C. would not have been regarded as an addition to the label and no disclaimer would have been required: *In re Smokeless Powder Co.'s Trade Mark* (2); *In re Clément & Cie.'s Trade Mark* (*the "St. Raphael" Case*). (3)

In the present case there is no added matter, which distinguishes it from *In re Faulder & Co.'s Trade Mark* (4), where it was said that the word "silverpan" was added matter and should have been disclaimed.

Walter, K.C., and *Colefax*, for the bread company, who opposed Baker & Co.'s application. As the claim of the applicants Baker & Co. is that the letters A. B. C. denote them and nobody else, our contention is that under s. 15 of the Act the Court should require them to execute a disclaimer of the exclusive use of those letters.

The bread company claim no exclusive right to use those letters and are willing to execute a disclaimer as a condition of

(1) (1907) 24 Rep. Pat. Cas. 582.
(2) [1892] 1 Ch. 590.
(3) [1900] 1 Ch. 114.
(4) [1902] 1 Ch. 125.

their label being registered. Either both labels should be registered, or neither.

Where an applicant claimed monopoly rights for his trade mark under the old law, the mark would be struck out unless he executed a disclaimer: *Burland* v. *Broxburn Oil Co.* (the "*Washerine*" *Case*) (1); *Thompson* v. *Miller* (the "*Roadster*" *Case*). (2)

The cases referred to by the applicants do not apply. In *In re Clément & Cie.'s Trade Mark* (3) and *In re Smokeless Powder Co.'s Trade Mark* (4) no monopoly rights were claimed.

In *Eno* v. *Dunn* (5) the whole decision of the House of Lords went on the view that fruit and salt were ordinary English words and were calculated to deceive the public. That case is in our favour. Since 1862 the letters A. B. C. have been associated with the bread company, and they have sold tobacco since 1894. The use of the letters by the bread company is a complete answer to Baker & Co.'s claim. Baker & Co. have to establish that the letters A. B. C. mean exclusively Albert Baker & Co. (1898), Limited, and that they have failed to do. Moreover, the labels are not distinctive.

Our objections therefore are (1.) that Baker & Co.'s mark is not a distinctive mark, (2.) that the letters are common to the trade, and (3.) that Baker & Co. are setting up a monopoly in the trade.

Further, the labels sought to be registered are advertisements, and thereby Baker & Co. bring themselves within the mischief of s. 41 of the Companies Act, 1862: *In re Guinness & Co.'s Trade Mark* (6); *In re Henry Clay and Bock & Co.* (7)

P. O. Lawrence, K.C., in reply. There is no substance in the objection taken by the bread company under s. 41 of the Companies Act, 1862. The contention that these labels are advertisements within that section is absurd. There need not be on a trade mark a word about the limited company which owns it; an

(1) (1889) 42 Ch. D. 274.
(2) (1895) 13 Rep. Pat. Cas. 35.
(3) [1900] 1 Ch. 114.
(4) [1892] 1 Ch. 590.
(5) (1890) 15 App. Cas. 252.
(6) (1888) 5 Rep. Pat. Cas. 316.
(7) [1892] 3 Ch. 549.

EVE J.
1908
ALBERT BAKER & Co.'s APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

instance in point is the B. S. A. trade mark in the case of *In re Birmingham Small Arms Co.'s Application.* (1)

Application has already been made to the registrar by us to amend the name of the applicants; and the Court can now give us leave to amend under s. 12, sub-s. 6, of the Act of 1905.

The omission to put the applicants' name upon their shops has now been rectified. There is an appropriate statutory penalty for such a case, and the omission cannot prejudice this application.

Again, there is nothing in the Act which confines the name or signature appearing in the trade mark to those of the applicant.

The *"Washerine" Case* (2), the *"Roadster" Case* (3), and the *"St. Raphael" Case* (4) do not apply, as they were decided under s. 64 of the Act of 1883, and were not cases of whole labels with parts common to the trade. They had nothing to do with a monopoly claim. We seek to register the label as a whole, and the question of disclaimer does not arise.

If Baker & Co. had been on the register for A. B. C. only for the whole of class 45, they would have had to come off for cigars and would have been left on for cigarettes: *Hargreave* v. *Freeman* (5); *In re Banks & James' Trade Marks.* (6) Therefore we ought to be able to go on for cigarettes alone.

The fact that the bread company's mark is registered in class 42 ought not to prejudice Baker & Co.'s application to be registered in class 45, and the user of the trade mark for articles of a totally different description does not impede the acquisition by Baker & Co. of an exclusive right to it as a trade mark for cigarettes: *Somerville* v. *Schembri.* (7) The evidence shews that until 1903 no other person had a brand of A. B. C. cigarettes, and we have used those letters for eight, if not eleven, years. There has been no abandonment by Baker & Co. of their right to exclusive user, and they were not bound to take action for slight infringement: per Pearson J. in *In re Wood's Trade Mark.* (8)

I submit that Baker & Co. have the exclusive right to the user

(1) [1907] 2 Ch. 396; 24 Rep. Pat. Cas. 563.
(2) 42 Ch. D. 274.
(3) 13 Rep. Pat. Cas. 35.
(4) [1900] 1 Ch. 114.
(5) [1891] 3 Ch. 39.
(6) (1895) 12 Rep. Pat. Cas. 333.
(7) (1887) 12 App. Cas. 453.
(8) (1886) 32 Ch. D. 247, 256.

of this trade mark for cigarettes, and that there is no substantial opposition to the registration of this trade mark. The use of this trade mark by them for cigarettes and by the bread company for eatables has never caused any confusion.

Walter, K.C., and *Colefax*, for the bread company's application. If both marks are placed upon the register there should be a disclaimer by both. The bread company's mark is not calculated to deceive, as the name of the company is on the seal of the company with the date of its formation. If the letters A. B. C. are common to the trade they are not calculated to deceive.

Baker & Co. really claim to have a monopoly of the letters A. B. C., but their contention is impossible in face of the rival users disclosed by the evidence—*Goodwin* v. *Ivory Soap Co.* (1)—and there has also been concurrent user of the letters by the bread company.

P. O. Lawrence, K.C., and *Sebastian*, for Baker & Co., who opposed the bread company's application. We oppose the bread company's mark coming on to the register for any goods in class 45. We submit that upon the evidence this case comes within *Eno* v. *Dunn*. (2) Baker & Co. have done all they can to make their trade mark known; they have put prominently before the public the letters "A. B. C.," and they have used them on their labels and on their shop fronts. We have established such a reputation that the registration of their mark by the bread company is likely to cause confusion, and their mark will be calculated to deceive the public, and therefore the Court ought not to allow their mark to be registered: *Eno* v. *Dunn*. (2)

It is strongly in our favour that we have used our mark for eight, if not eleven, years without a suggestion that there has been any confusion between our cigarettes and their buns and cakes. The question now is one dealing with the tobacco trade as distinguished from the refreshment trade. The bread company have never before given prominence to the letters A. B. C. until they launched out into the tobacco trade.

The case of *Birmingham Small Arms Co.* v. *Webb & Co.* (3),

(1) (1900) 17 Rep. Pat. Cas. 689. (2) 15 App. Cas. 252.
(3) (1906) 24 Rep. Pat. Cas. 27.

EVE J.
1908
ALBERT BAKER & Co.'s APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

where the defendants used the letters "B. A. S.," is a good illustration of a case where confusion is likely to ensue from the use of similar letters; and a similar confusion would be bound to arise in this case if the bread company are allowed to register their mark.

Even without disclaimer the Court will not allow a confusing mark to be put on the register.

Walter, K.C., in reply. The registrar refused to put our mark upon the register by reason of the provisions of s. 20 of the Act of 1905, and on no other ground. Baker & Co. rest their opposition to the registration on *Eno* v. *Dunn* (1), but that case was a passing-off case and has nothing to do with this case. Both *Eno* v. *Dunn* (1) and the *"Motricine" Case* (*In re Price's Patent Candle Co.'s Trade Mark*) (2) are entirely different cases from the present, and are not cases of concurrent user, but of new application. Sects. 20 and 21 expressly contemplate the question whether persons having identical marks are both to go on the register.

Sects. 11 and 20 stand side by side, and if Baker & Co.'s contention is right, it is only necessary to see whether the proposed mark is likely to deceive to disentitle it to registration. But that leaves out of consideration s. 20, which allows two persons to register the same marks. I suggest that s. 11 has nothing to do with the present question unless there is something in the trade mark which disentitles the applicants to protection in a Court of Law. Sect. 11 applies to some inherent falsehood in the mark; the words "contrary to . . . . morality, or any scandalous design" shew the intention of the Legislature.

Assuming that s. 11 does deal with cases such as *Eno* v. *Dunn* (1), yet s. 20 expressly overrides it in cases of honest concurrent user.

From 1903 the bread company have used the letters A. B. C. as a brand, and there is not a suggestion of passing off or confusion. There is no suggestion that Baker & Co. have abandoned their mark or are not entitled to go on the register.

Somerville v. *Schembri* (3) and *In re Banks & James' Trade*

(1) 15 App. Cas. 252.
(2) [1907] 2 Ch. 435.
(3) 12 App. Cas. 453.

Marks (1) do not apply, for in this case the question is between cigarettes and tobacco, and not between cigarettes and other articles of a different nature. The cases dealing with infringement do not apply here: *In re Australian Wine Importers, Ld.* (2) We are quite content that their mark should go on the register with a disclaimer. Baker & Co. set up a monopoly, but the evidence shews that they are not exclusively entitled to the letters A. B. C. We say that the bread company are entitled to go on the register because of their honest concurrent user.

Cur. adv. vult.

March 24. EVE J. stated the facts above set out and continued:—It will, I think, be convenient if I state at this point some of the conclusions of fact at which I have arrived after a full consideration of the controversial parts of the evidence.

In the first place I think Baker & Co. have clearly established that in the tobacco trade and amongst manufacturers and dealers they are widely known and frequently spoken of as A. B C. or A. B. & Co., and further, though to a much more limited extent, that goods are invoiced to them by wholesale houses as A. B. C.

I think also they have proved that to some members of the public they have come to be known as the A. B. C. tobacconists, that persons so knowing them have in connection with tobacco and kindred subjects become accustomed to speak of them as A. B. C. and of their shops as A. B. C. shops, and that assistants in the shops have from time to time been asked for their goods as A. B. C. goods.

On the other hand I think they have failed to shew that in the tobacco trade the letters exclusively indicate their goods. I am quoting the expression from paragraph 3 of Mr. de Meza's declaration of October 17, 1906, an expression which he explained in cross-examination was intended to be equivalent to a claim for monopoly of the letters A. B. C. in connection with tobacco, tobacco pipes, matches, and all other goods generally sold by tobacconists. Apart from cigarettes, with which I will deal

(1) 12 Rep. Pat. Cas. 333. (2) (1889) 41 Ch. D. 278, 282.

EVE J.
1908
ALBERT BAKER & Co.'s APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

by-and-by, the evidence has established that there have been on the market, for many years past, cigars to which the letters have been applied as a brand; other cigars in connection with which, either by lettering on the box or the label, or both, or by a band on the cigars themselves, or by monogram on the box, or by edging round the edges of the box, the letters have been freely used; and, further, that there are registered trade marks containing the letters for pipes and for matches.

More particularly as regards cigarettes it has been proved that in addition to their use by the bread company, to which I have already referred in detail, the letters "A. B. Co. Ld." for sixteen years and more past have appeared and are still appearing on cigarettes supplied by the Automatic Box Company, Limited, and their successors in business, for sale by means of automatic machines at the Hôtel Métropole and the Vienna Café in Oxford Street, and, further, that from 1894, or thereabouts, down to his death in April, 1906, the late Mr. Alexander Boguslapsky used the letters A. B. & Co. with his retail address under them as a mark on all the cigarettes manufactured by him, and Mrs. Gompertz, who was general manager from 1894 to 1906 at Boguslapsky's factory and had to superintend all the work of the twenty girls engaged there, said that hundreds of thousands of cigarettes so marked passed through her hands. There is also some slight evidence that Avis Brothers, of Coventry, used for their cigarettes papers marked A. B. C.

It is right that I should add that Mr. de Meza stated, and I have no doubt truthfully stated, that all these users were unknown to him until after the application to register was made by Baker & Co.

Such being the position of affairs, the rival traders apply to register their respective marks, and it is now necessary that I should consider each application and the opposition thereto separately. And I will deal first with Baker & Co.'s.

So far as the application is concerned it is unnecessary for me to say anything more about it than this, that it is an application to register a series of four labels, three of which had been in continuous use for eleven years and the fourth for three years prior to the application, and that admittedly it is a registrable trade mark

of a distinctive character adapted to distinguish Baker & Co.'s goods from those of other persons. The opposition is based partly upon some technical grounds with which I will deal in a moment, but mainly upon the concurrent user of the letters A. B. C., which constitute part of the label sought to be registered, by the opponents and by the other companies and firms to which I have referred, and it is said that the Court ought to require as a condition of the mark being registered that the proprietors should disclaim any right to the exclusive use of that part of the label.

The technical objections are four in number. First, it is said that the application to register is not made in the name of the applicants, but in the name of their predecessors. That is the fact, but the mistake is one which the Court has power to correct, and in the circumstances of this case I have no doubt that I ought to permit the applicants to amend their application by inserting their correct and full name. Secondly, it is alleged that the label contains the name "A. Baker & Co. Ld." and the signature "A. Baker & Co.," and that neither the name nor the signature is that of the company. All this is true, but the signature and name are those of predecessors of the company who respectively introduced and used the label, and there is nothing in the Act which confines the name or signature appearing in the trade mark to the name or signature of the applicant. Indeed sub-ss. 1 and 2 of s. 9 point in exactly the opposite direction. Thirdly, it is said that at the date of the application the applicants had not painted or affixed their name on the outside of every shop in which their business was being carried on. This is also the fact, but the offence was a statutory one for which a statutory penalty is provided, and I do not think it affords any ground of opposition open to the opponents. The fourth technical objection is that the label is an advertisement within s. 41 of the Companies Act, 1862, and ought therefore to have the company's name "Albert Baker & Co. (1898), Limited," mentioned in it in legible characters. I do not agree with this contention. No doubt a trade mark may be, and often is, used for purposes of advertisement, but it is also used largely for purposes of identification; and bearing in mind that it is common

EVE J.
1908
ALBERT BAKER & Co.'s APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

knowledge that many very valuable trade marks belonging to limited companies bear no name at all, it would, in my opinion, be unduly straining s. 41 to hold that the word "advertisement" covers and includes all trade marks. I therefore overrule all the technical objections and turn to the consideration of s. 15 of the Act of 1905, under which I am asked to impose a disclaimer of the right to the exclusive use of the letters A. B. C. as a condition of registration. The section is in these terms: [His Lordship read the section and continued:—]

In view of the conclusion I have arrived at, that Baker & Co. have failed to establish that the letters A. B. C. exclusively indicate their goods, it follows that the mark they are seeking to register contains matter common to the trade, as interpreted by the Court in *Burland* v. *Broxburn Oil Co.* (1) and other cases, and what I have to determine is whether, in the exercise of the discretionary power vested in the Court under the section I have just read, I ought to impose upon them the condition of disclaiming the exclusive right to that part of the mark.

The section replaces two sections of the Act of 1883—ss. 64 and 74 as amended by ss. 10 and 16 of the Act of 1888. Under the sections of the earlier Act, as so amended, it was compulsory for the applicant who added to the essential particulars of his mark under s. 64 any letters, words, or figures, or combination of letters, words, or figures, or under s. 74 any distinctive device, mark, brand, heading, label, ticket, letter, word, or figures, or combination of letters, words, or figures, common to the trade, to state in his application the essential particulars of his trade mark, and to disclaim any right to the exclusive user of the added matter. Under the present Act disclaimer is no longer compulsory; the question whether there is to be a disclaimer or not rests with the Board of Trade or the Court.

The first observation which it occurs to me to make is that the object of the Legislature was to relieve traders from the necessity of disclaiming, and I think it follows from this that the condition is one for the imposition of which some good reason ought to be established rather than one which ought to be imposed, unless some good reason to the contrary is made

(1) 42 Ch. D. 274.

out. This conclusion is, I think, fortified by the frame of the section, which is in an enabling form empowering the tribunal to impose the condition—a power which, I conclude, the tribunal would only exercise for good cause shewn.

I think, further, I am entitled, in considering how I ought to exercise my discretion, to have regard to decisions upon the sections of the earlier Acts, and if I have rightly apprehended the cases of *In re Clément & Cie.'s Trade Mark* (1) and *In re Smokeless Powder Co.'s Trade Mark* (2), the letters A. B. C. in this mark would not have been regarded as an addition to the label, in respect of which a disclaimer would have been necessary. In saying this I do not, of course, overlook the fact that in the present section the subject-matter of disclaimer is not limited to additions. Still, the fact that under the old system of compulsory disclaimer this part of the mark would not have required a disclaimer is an element which I cannot altogether disregard.

But Mr. Walter and Mr. Colefax, on the part of the opponents, in the first place do not admit that the cases I have referred to would have concluded the matter under the old practice, and they point to the "*Washerine*" *Case* (*Burland* v. *Broxburn Oil Co.*) (3), which I have already mentioned, and the "*Roadster*" *Case* (*Thompson* v. *Miller*) (4) as cases which go to support their contention here, namely, that where the applicant claimed a monopoly he was bound to disclaim under the old law, and that in exercising the discretion under the existing statute the Court ought also, where a monopoly claim is put forward, to treat that as a sufficient ground for imposing the condition of a disclaimer.

I do not think the decisions in the two last-mentioned cases proceeded upon the ground that the claim to a monopoly necessarily involved a disclaimer. In each case the learned judge came to the conclusion as a matter of fact that the subject-matter of the disclaimer was added matter of a descriptive nature and incapable of being used as a trade mark, and, having arrived at this conclusion of fact, a disclaimer under

(1) [1900] 1 Ch. 114.
(2) [1892] 1 Ch. 590.
(3) 42 Ch. D. 274.
(4) 13 Rep. Pat. Cas. 35.

EVE J. 1908

ALBERT BAKER & CO.'S APPLICATION, *In re.*

AERATED BREAD COMPANY'S APPLICATION, *In re.*

s. 74 of the Act of 1883 was ordered to be entered on the register in respect of the added matter.

I do not think, therefore, there is any authority which compels me to hold that whenever a claim to monopoly is put forward I ought to impose the condition of a disclaimer, and in the absence of such authority I think I should be doing wrong to adopt or lay down such a rule. In the present case I have to deal with a state of facts upon which a claim to monopoly might be, and I have no doubt has been, put forward and asserted with perfect good faith. Continuously for eleven years and more prior to the date of the application, as I have already mentioned, the mark sought to be registered has been very largely used. During that period the applicants have had no notice or knowledge that any other person was using any part of the combination which makes up the mark, and no complaint, mistake, or confusion has ever been made or arisen in relation thereto. Under all these circumstances I think I should not only be inflicting an unnecessary hardship on the applicants were I to exercise my discretion by imposing on them a condition requiring them to disclaim any part of their combination, but I should also be establishing a precedent that wherever a claim to monopoly is put forward and fails the condition of disclaimer ought to be imposed, and, as I have already said, I am not prepared to adopt any such general rule. On the first motion, therefore, I make an order amending the application of July 20, 1906, by substituting the name of Albert Baker & Co. (1898), Limited, for the name of Albert Baker & Co., Limited, as the name of the applicant, and I direct the registrar to proceed with the application as so amended for the registration of the trade mark No. 284,766.

The bread company's application is in effect an application to extend to the goods covered by class 45 the trade mark already registered and used by them in respect of class 42. Applying thus to register a registrable mark they are met with the objection that it ought not to be registered for the particular class because it contains matter the use of which would, by reason of its being calculated to deceive, be disentitled to protection in a Court of justice. This objection is founded on s. 11 of the Act of 1905, which is in these terms: [His Lordship read the section,

and continued :—] Mr. Walter suggested that that section was directed to some deceptive or untrue matter to be found in the mark itself, some inherent falsity such as to disentitle it to recognition in a Court of justice, and that it was never framed to meet cases in which the only possibility of deception arises from similarity of shape or combination tending to confuse the public mind; but in view of the authority of *In re Price's Patent Candle Co.'s Trade Mark* (1) it is quite impossible for me to accept that suggestion, and I must on the authority of that decision treat s. 11 as substituted for and taking the place of s. 73 of the Act of 1883 as amended by s. 15 of the Act of 1888. As so amended s. 73 reads, "It shall not be lawful to register as part of or in combination with a trade mark any words, the use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of justice, or any scandalous design."

The principles to be applied in interpreting that section are thus laid down by Lord Watson in *Eno* v. *Dunn* (2): "These prohibitory clauses cast upon the applicant the duty of satisfying the comptroller, or the Court, that the trade-mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There, the onus of shewing that his trade-mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is in petitorio, and must justify the registration of his trade-mark by shewing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, in dubio, his application ought to be disallowed"; and by Lord Herschell, as follows (3): "The case was argued on behalf of the respondent as if he had an absolute right to have any trade-mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. I do not so read the statute. Those sections prohibit the registration of a trade-mark in certain specified cases; but there is no duty cast upon the comptroller

(1) [1907] 2 Ch. 435. (2) 15 App. Cas. 252, 257.
(3) 15 App. Cas. 261.

EVE J.
1908
ALBERT BAKER & Co.'s APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

of registering every other trade-mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised; but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it." Lord Macnaghten also lays down the principles, thus (1): "Between rival traders, the application of the principle is necessarily a matter of extreme difficulty. But, as between the innocent public and a trader seeking registration of a proposed trade-mark, there is, I think, no room for hesitation or doubt. The statute allows any person to oppose an application for registration, whether he has or has not a personal interest in the result. It declares that it is not lawful to register as part of or in combination with a trade-mark any words, the exclusive use of which would, by reason of their being calculated to deceive, be deemed disentitled to protection in a Court of justice. It seems to me that in registering trade-marks the principle to which the enactment so plainly refers ought to be applied without any qualification whatever, and that the comptroller, to whom in the first instance is committed the 'discretionary power,' as it is termed in the Act (s. 94), of registering a trade-mark ought to reject words which involve a misleading allusion or a suggestion of that which is not strictly true, as well as words which contain a gross and palpable falsehood. In the present case the evidence shews that the expression 'Fruit Salt' has come to mean Mr. Eno's preparation, that at present it means nothing else, and that Mr. Eno's preparation is well known and very popular. Mr. Dunn adopts the expression 'Fruit Salt,' and gives it a prominent position among the words he seeks to register. I have no doubt that those words are calculated to deceive. They are calculated, and I think designed, to create a confusion in the minds of those persons to whom Mr. Dunn's advertisements are addressed, and to lead the ordinary run of such persons to suppose that his baking powder is in some way or other connected with Mr. Eno's

(1) 15 App. Cas. 262.

preparation. The object I think was—and if Mr. Dunn's application were successful the result, I am convinced, would be, in some cases at any rate—to induce people to buy under an impression 'not founded in truth,' and not perhaps the less misleading because it is vague and indefinite, and incapable, it may be, of bearing the very slightest examination. Mr. Eno has not and cannot have any exclusive property in the expression 'Fruit Salt.' The words of which it is composed are common English words; anybody may use them in any manner and in any connection he pleases, provided the use to which they are applied is not calculated to deceive."

I do not refer to the facts of that case because in *In re Price's Patent Candle Co.'s Trade Mark* (1) Warrington J. has expressed the opinion that the principles there enunciated were principles of general application and not in any way referable only to the fraudulent intent which was found to exist in that case.

Those being the principles equally applicable to cases falling to be determined under s. 11 of the Act of 1905, I have to decide whether the bread company have discharged the burden of shewing affirmatively that the mark they are seeking to register is not calculated to deceive, and in arriving at a conclusion upon this point it is necessary to eliminate from one's mind any evidence of mistakes due to alleged similarity of window dressing and the like—the more so, perhaps, as one witness who was called, and who undoubtedly did enter one of the bread company's shops in mistake for Baker & Co.'s, admitted in cross-examination that the letters A. B. C. had nothing to do with his mistake, and the other witness who had made the same mistake stated that, although he had heard Baker & Co. spoken of as A. B. C., he had never noticed the letters on their shops and had never asked for goods, tobacco, cigarettes, or cigars under those letters, and had been led to enter the bread company's shop on Ludgate Hill in mistake for Baker & Co.'s by the general appearance of the shop.

A comparison of the marks shews them to be wholly dissimilar, but the letters A. B. C. in the bread company's mark are said to be matter the use of which is calculated to deceive.

(1) [1907] 2 Ch. 435, 444.

EVE J.
1908
ALBERT BAKER & CO.'S APPLICATION, *In re.*
AERATED BREAD COMPANY'S APPLICATION, *In re.*

Whether or not such matter is calculated to deceive must in many cases be a conclusion to be arrived at after hearing the opinions of those qualified to conjecture as to the probable effects on the public mind, but in the present case I am not left to form my judgment on mere presumptions of what may or what will be the effect of a concurrent user by two traders of these letters. I have here abundant evidence to shew that in the past the concurrent user by the bread company and by Baker & Co. and others of these same letters for the same goods has not led to any mistake, confusion, or complaint, and I think I should be paying too little attention to the experiences of the past and too much to the apprehensions of the rival traders as to the future were I to hold that the extension of the bread company's business is calculated to bring about results contrary to all past experiences. It seems to me that the bread company are entitled to rely on what has happened hitherto as the best available criterion of what is likely to happen in the future, and that in the face of past experience I should be doing the bread company an injustice were I to hold that they have not discharged the burden which lies upon them. I hold, therefore, that their mark is not calculated to deceive, and in this case also I direct the registrar to proceed with the application for the registration of the trade mark No. 282,213.

As regards the costs, the bread company have already been ordered to pay Baker & Co.'s costs of the application which resulted in the order of July 18, 1907, and if I thought that any substantial additional costs had been incurred by Baker & Co. in respect of the technical objections 1 to 5 raised by that order, I should order the same to be paid by the bread company under the reservation contained in the order; but such objections have not necessitated any evidence, and consequent thereon Baker & Co. have had their attention directed to the statutory offences which they were committing and have also obtained leave to amend their application. I think, therefore, justice will be done if I leave each party to bear their own costs.

Solicitors: *G. B. Ellis; Bristows, Cooke & Carpmael.*

R. M.

EVE J.
1908
Feb. 5;
April 1.

In re JAMESON.
KING *v.* WINN.

[1907 J. 1077.]

Will—Specific Legacy—Misdescription—Shares in a Bank—Absorption by another Bank — Extrinsic Evidence — Admissibility — Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24.

By her will, made in 1902, a testatrix bequeathed to two legatees equally "all my shares in the Wensleydale and Swaledale Banking Company." There was no bank of that name in existence at the date of the will, or at the death of the testatrix in 1906, but for some years prior to 1899 the testatrix had been the possessor of twenty-five shares in the Swaledale and Wensleydale Banking Company, Limited. The undertaking of this bank was amalgamated with Barclay & Co., Limited, as from July 1, 1899, and the testatrix received twenty-five shares in Barclay & Co., Limited, in exchange for her shares in the absorbed bank. At the date of her death the testatrix still held the twenty-five shares in Barclay & Co., Limited, and had no other bank shares. Evidence was admitted shewing the dealings of the testatrix with the shares, and her knowledge of the amalgamation:—

Held, that the twenty-five shares in Barclay & Co., Limited, passed to the specific legatees, and did not fall into the residue.

Adjourned Summons.

By her will, dated March 10, 1902, Alice Elizabeth Jameson, of Elm Tree House, Cottingham, in the East Riding of the county of York, appointed her nephews, the plaintiffs in the action, to be her executors and trustees, and after giving her wearing apparel and jewellery to Mrs. Elizabeth Lucinda Lister and Miss Jane Burrill equally, she further bequeathed to Mrs. Lucinda Lister "my Consols (that is to say, all the stock in the public funds of the United Kingdom of which I may be possessed at my decease)." She then made the following bequest:—"I give to my niece, Mrs. Jane Winn, and to the said Jane Burrill, equally, all my shares in the Wensleydale and Swaledale Banking Company." The will contained a residuary bequest to the trustees in trust for her two great-nieces, the two last defendants, Doris Saner Jameson and Maud Jameson. The testatrix died on December 30, 1906, and

EVE J. 1908 JAMESON, *In re.* KING *v.* WINN.

her will was proved by the executors therein named. There was, in fact, no such bank as the Wensleydale and Swaledale Banking Company, but there had been a bank called the Swaledale and Wensleydale Banking Company, Limited, in which the testatrix, for some years prior to the date of her will, had been the registered proprietor of twenty-five ordinary shares, of the nominal value of 50*l.* each, with 7*l.* 10*s.* paid up thereon. This bank had its head office at Richmond, in the North Riding of Yorkshire. By an agreement dated June 29, 1899, the undertaking of the Swaledale and Wensleydale Banking Company, Limited, was taken over by and amalgamated with Barclay & Co., Limited, of 54, Lombard Street, in the city of London, as from July 1, 1899, upon the terms of the allotment of new shares by Barclay & Co., Limited, to the shareholders of the Swaledale and Wensleydale Banking Company, Limited, in proportion to their holdings, of shares in that company. Mrs. Jameson accordingly became entitled to twenty-five ordinary shares of 20*l.* each in Barclay & Co., Limited, credited with 8*l.* as paid up thereon, in exchange for the twenty-five shares she had previously held in the Swaledale and Wensleydale Banking Company, Limited. These twenty-five shares in Barclay & Co., Limited, were allotted to her on August 11, 1899, the certificates were sent to her on October 11, 1899, and she received the dividends. She held these shares at the time of making her will on March 10, 1902, and also at her death on December 30, 1906, and possessed no other bank shares. The Swaledale and Wensleydale Banking Company, Limited, went into voluntary liquidation for the purpose of carrying out the transfer, and one of the liquidators made an affidavit proving that the testatrix received all the notices in connection with the amalgamation with Barclay & Co., Limited, and filled up the necessary application form for the new shares in Barclay & Co., Limited, and received the dividends thereon after they were allotted to her. There was evidence also that the testatrix was much averse to the amalgamation, and often spoke of Barclay & Co., Limited, after the amalgamation, by the name of the absorbed bank. The old name was also retained on the doors of the various branches in the North Riding of Yorkshire, together with the new title, in order to retain the

former customers of the bank. An originating summons was taken out by the trustees of the will on June 14, 1907, asking, inter alia, whether the defendants, Jane Winn and Jane Burrill, were entitled to the twenty-five ordinary shares in Barclay & Co., Limited, under the specific bequest in the will of "all my shares in the Wensleydale and Swaledale Banking Company."

T. H. Attwater, for the trustees of the will.

W. R. Sheldon, for the specific legatees. The Court must give some meaning to the words of the gift in this will. What had been shares in the Swaledale and Wensleydale Banking Company, Limited, became shares in Barclay & Co., Limited. The testatrix wrongly described the shares which she had, but evidence is admissible to shew what her dealings with the shares were, in order to explain what she meant by these words. It is a case of an inaccurate description on which there are numerous authorities: Wigram on Extrinsic Evidence, 4th ed. p. 65; *Door* v. *Geary* (1); *Penticost* v. *Ley* (2); *Trinder* v. *Trinder* (3); *Flood* v. *Flood* (4); *Selwood* v. *Mildmay* (5); *Dobson* v. *Waterman* (6); *Lindgren* v. *Lindgren*. (7) The question of the operation of s. 24 of the Wills Act which was considered in the cases of *Goodlad* v. *Burnett* (8) and *In re Gibson* (9) does not really arise here. What is a sufficient contrary intention is shewn in the case of *In re Portal and Lamb*. (10) The 24th section is an enabling section, and its object is not to defeat, but to give effect to, the testator's intention. The case of *In re Slater* (11), which may be relied upon by the other side, does not really apply. That was a case of ademption. Here there was nothing exactly answering the description of the shares at the date of the will or at the death, but there is enough to give effect to the manifest intention. Could it be said that the testatrix did not intend to give any benefit to the specific legatees? As in *Lindgren* v. *Lindgren* (7),

(1) (1749) 1 Ves. Sen. 255.
(2) (1820) 2 Jac. & W. 207.
(3) (1866) L. R. 1 Eq. 695.
(4) [1902] 1 I. R. 538.
(5) (1797) 3 Ves. 306.
(6) (1787) 3 Ves. 308, n.
(7) (1846) 9 Beav. 358.
(8) (1855) 1 K. & J. 341.
(9) (1866) L. R. 2 Eq. 669.
(10) (1885) 30 Ch. D. 50.
(11) [1906] 2 Ch. 480; on appeal, [1907] 1 Ch. 665.

EVE J.
1908
JAMESON, *In re.* KING *v.* WINN.

the intention being clear, there is no rule of law which prevents effect being given to it.

A. St. John Clerke, for the residuary legatees, some being infants. Extrinsic evidence may be resorted to in order to find out whether the subject-matter of the bequest existed or not at the death of the testatrix. And the specific gift would not be limited to what the testatrix had at the date of her will. That would be so having regard to the form of the bequest to Mrs. Lucinda Lister. But in the particular bequest to be construed here there were no shares at all answering the description either at the date of the will or at the death. The gift is in its nature generic, and s. 24 of the Wills Act, 1837, applies. The bequest fails altogether, and the shares in Barclay & Co., Limited, fall into residue, according to *In re Slater* (1): Theobald, on Wills, 7th ed. p. 130; *In re Portal and Lamb.*(2)

EVE J. (after stating the facts). Now the position is this. The specific legatees, Mrs. Winn and Miss Burrill, claim the twenty-five shares in Barclay & Co., Limited, which the testatrix retained down to the date of her death. On the other hand, on behalf of the residuary legatees, it is said that the bequest did not include these shares, and that, there being no shares answering the description at the death, the bequest fails, and the twenty-five Barclay & Co. shares fall into the residue. It is common ground that up to a certain point evidence is admissible. Supposing that the Swaledale and Wensleydale Banking Company, Limited, had not ceased to exist, and that at the death of the testatrix there had been found in her possession the certificates for twenty-five shares in the Swaledale and Wensleydale Banking Company, Limited, the Court would have had to determine whether the bequest of the twenty-five shares in the Wensleydale and Swaledale Banking Company was intended to include the twenty-five shares in the Swaledale and Wensleydale Banking Company, Limited. It is quite obvious that evidence would have been admissible for the purpose of explaining the slip in the description of the banking company. As I read the authority of *In re Slater* (3),

(1) [1906] 2 Ch. 480; on appeal, [1907] 1 Ch. 665.
(2) 30 Ch. D. 50.
(3) [1906] 2 Ch. 484.

to which Mr. St. John Clerke referred me, Joyce J. stated in that case that the first question which the Court had to consider was, "What does the will mean? What is the testator describing or dealing with? or, as Lindley J. expresses it in *In re Bridle* (1), What is it that is bequeathed?" Putting that question to myself "what is it that is bequeathed," it seems to me that I have to determine whether the description of "all my bank shares in the Wensleydale and Swaledale Banking Company" meant the shares which were represented by these shares in Barclay & Co., and which were the only bank shares which the testatrix then had. Now I find it very difficult to say at what point the line should be drawn with regard to the admission of evidence. As I have already indicated, if the Swaledale and Wensleydale Banking Company, Limited, were now in existence, it is quite clear, upon the authorities, that I should have been bound to look at evidence going to shew that the Wensleydale and Swaledale Banking Company had never existed, but that there had existed a bank known as the Swaledale and Wensleydale Banking Company, Limited, and that the testatrix had shares in it. Can I now draw the line and say, while endeavouring to give some meaning to the bequest in the testatrix's will, that I ought to exclude evidence going to shew that the shares which she originally held in the bank, and which are misdescribed, are and were, at the date of the will, represented by the shares in Barclay & Co.? It seems to me, in considering what it is that is bequeathed, or what is in the mind of the testatrix, I am bound to admit evidence shewing what has been the dealing with the subject-matter she purports to describe in her will, at a date antecedent to the will. Looking at that, no reasonable man can doub tthat the testatrix meant here in this bequest these shares which, at the date of her will, represented the holding which she previously had in the Swaledale and Wensleydale Banking Company, Limited. And I say that for this reason, that there is evidence that she never had any other bank shares, and, so far as the bank was concerned, it continued the old name in its documents and in the notices which were put up outside the bank premises, and it also retained its old name on the cheques

(1) (1879) 4 C. P. D. 336, 341.

EVE J.
1908
JAMESON, *In re.* KING *v.* WINN.

and circulars. These local banks, when absorbed by larger joint stock banks, do not, as a rule, discontinue the use of the old name. It is obvious, in order to keep the connection together and to retain the confidence of customers, that it is greatly to the interest of the acquiring bank to continue the identification of the old bank.

Admitting this evidence, no reasonable man can doubt that the lady was referring to the shares in Barclay & Co.'s bank. Having arrived at that conclusion, the next thing which I have to consider is, Was there any subject-matter at the date of the death to answer the subject-matter of the bequest? I take the view that Mr. St. John Clerke has suggested, that, having regard to the form of the bequest to Elizabeth Lucinda Lister of "my Consols (that is to say, all the stock in the public funds of the United Kingdom of which I may be possessed at my decease)," this bequest of "all my shares" would have included any additional shares which the testatrix might have acquired in Barclay & Co. after the date of her will. But, fortunately, it is not necessary to consider that point, because she never acquired any more shares or parted with any which she held. It seems to me, having answered the first question in the way which I have, namely, that the twenty-five shares which the testatrix held in Barclay & Co. are the subject-matter of the bequest, I am bound to hold, and I am glad to be able to hold, that these shares pass to these specific legatees, and do not fall into the residue. I cannot help feeling that this is in accordance with what was the wish and intention of the testatrix.

Solicitors: *Redpath, Marshall & Holdsworth, for Shackles & Dunkerly, Kingston-upon-Hull; Burton, Yeates & Hart, for H. Maughan, Middleham, Yorks.*

G. M.

In re LAMBERT.
CORNS *v.* HARRISON.

[1907 L. 2450.]

EVE J.
1908
April 2.

Will—Construction—Words of Futurity—Gift to Nephews and Nieces—Gift to Children of Nephew in case any Nephew "shall die in my lifetime"—Nephew dead at Date of Will leaving Child.

Testatrix by her will gave the residue of her estate "in trust for all my nephews and nieces who shall be living at my death to be equally divided between them Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such persons had survived me."

Held, that the child, who attained twenty-one and survived the testatrix, of a nephew already dead at the date of the will was entitled to share in the residue.

Loring v. *Thomas*, (1861) 1 Dr. & Sm. 497, and *Barraclough* v. *Cooper* (note, p. 121), followed.

Gorringe v. *Mahlstedt*, [1907] A. C. 225, distinguished.

ADJOURNED SUMMONS.

By her will, dated January 8, 1906, Elizabeth Bock Lambert, the testatrix, appointed the plaintiff, Thomas Corns, executor and trustee and devised and bequeathed to him all her real and residuary personal estate upon trust to convert the same into money, and after payment of her funeral and testamentary expenses and legacies to stand possessed of the residue of such moneys and the investments for the time being representing the same "In trust for all my nephews and nieces who shall be living at my death to be equally divided between them Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that

EVE J.
1908
LAMBERT, *In re.* CORNS v. HARRISON.

age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such persons had survived me."

Colpitts Harrison, a nephew of the testatrix, was dead at the date of the will. The defendant Stewart Colpitts Harrison was his son and had attained the age of twenty-one years.

This was a summons by the executor for the determination of the question whether the defendant Stewart Colpitts Harrison was entitled to participate in the residuary estate of the testatrix.

Vernon, for the plaintiff.

J. E. C. Adams, for the defendants other than S. C. Harrison. The question is whether this gift falls within the rule in *Loring* v. *Thomas* (1) or under that class of cases in which that rule has not been applied, the latest instance of which is *Gorringe* v. *Mahlstedt* (2), which decision is in my favour. Whenever the word "shall" is used in this will it is used almost without exception in a future sense. The trust is for the nephews and nieces who "shall" be living; and again "shall" survive, that must be future. Prima facie "shall" should have a future meaning.

P. O. Lawrence, K.C., and *Stafford Crossman*, for the defendant S. C. Harrison. We submit that this gift falls directly within the rule in *Loring* v. *Thomas*. (1) That case was recently recognized as an established authority by the House of Lords in *Barraclough* v. *Cooper* (3), where there were the same features as in *Gorringe* v. *Mahlstedt*. (2) In this case "shall die" is equivalent to "shall have died"; and "shall attain twenty-one" to "shall have attained twenty-one." Otherwise, in the latter instance, a grandchild who had attained twenty-one before the date of the will could not take any share in the event of his or her parent dying between the date of the will and the death of the testator. *Gorringe* v. *Mahlstedt* (2) is distinguishable from the present case on two grounds; first, there was in that case an express provision

(1) 1 Dr. & Sm. 497. (2) [1907] A. C. 225.
(3) See note at end of case, p. 121.

for the children of a son already dead at the date of the will, and, again, in that case there was no provision in the substitutional gift to the grandchildren making the indefeasible vesting of the shares conditional upon the grandchildren attaining twenty-one or marrying. This case is not distinguishable from *Loring* v. *Thomas* (1), which was approved in *Barraclough* v. *Cooper* (2) and followed by Joyce J. in *In re Stokes.* (3)

J. E. C. Adams, in reply.

EVE J. stated the gift of residue and continued: —The question which I have to determine was put by Kindersley V.-C. in *Loring* v. *Thomas* (4) in these words: "whether the testator intended to make the gift by way of substitution of the issue only of those who were living at the date of the will, or to include the issue of any pre-deceased child"; and he says further that this is a question of intention which can be taken from the language of the will.

Now it is quite obvious that the original gift is to those nephews and nieces who should be living at the time of the death of the testatrix, and it is quite obvious that the testatrix could not have included in that gift a nephew or niece who was already dead at the time of the will; the proviso which concludes with the words giving to the issue of a child the share which his, her, or their parent would have taken of and in the residuary trust funds if such persons had survived the testatrix raises a hypothetical question and contemplates a hypothetical position. There can be no question that if the deceased nephew or niece had in fact survived the testatrix the share which the nephew or niece would under that hypothesis have taken is the subject-matter of this substitutional gift. Then the question is whether the phrase "if any nephew or niece of mine shall die in my lifetime" includes a nephew or niece who may be dead at the date of the will, or is to be confined to those nephews and nieces who may die between the date of the will and the death of the testatrix. It is said that if those words are read in their strict sense they can only apply to the latter class, because clearly the testatrix,

(1) 1 Dr. & Sm. 497.
(2) See note at end of case, p. 121.
(3) (1907) 52 Sol. J. 11.
(4) 1 Dr. & Sm. 523.

EVE J.
1908
LAMBERT, *In re.* CORNS *v.* HARRISON.

looking at matters as they were at the date of her will, has contemplated the changes which may take place between that time and the date of her death. The words are "shall die in my lifetime"; pausing there, the words "shall die" points to futurity, to an event which may happen between the date of the will and the death of the testatrix; but it is said that it is settled by authority that those words are not to be read as words of futurity if the Court comes to the conclusion that they are not used in a strictly grammatical sense importing futurity, but are equivalent to "shall have died in my lifetime," and Kindersley V.-C., in *Loring* v. *Thomas* (1), said that that meaning must be put upon them in cases where words of futurity are used in such circumstances that they do not refer to events which are necessarily future. In the will before me I find exactly the same thing, because the testatrix, after referring to the death of a nephew or niece in her lifetime, goes on to say "leaving a child or children who shall survive me"—that is a matter of futurity—"and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such persons had survived me." Now, as the Vice-Chancellor pointed out in *Loring* v. *Thomas* (1), it would be doing violence to what I must assume to be the meaning of the testatrix if I were to hold that only those who attained twenty-one after the date of the will participated, and were thus to exclude those who at the time of the will had already attained twenty-one or married. It seems to me that I have all the elements to make this a case which, to use Romer L.J.'s words in *Barraclough* v. *Cooper* (2), "cannot substantially be distinguished from and is governed by *Loring* v. *Thomas*." (1)

It is said, and said correctly, that *Gorringe* v. *Mahlstedt* (3) is treated as an exception to the rule in *Loring* v. *Thomas* (1), and it is an exception founded on two considerations. In the first

(1) 1 Dr. & Sm. 497. (2) See note at end of case, p. 121.
(3) [1907] A. C. 225.

place, there was on the face of that will an indication that the testator knew that one of his sons was dead, and he bequeathed legacies to the children of that son, and that looks as if he knew that those children would not come in under the gift of the shares of residue, and so he provided for them by separate legacies. Further, in that will, there was no provision in the substitutional gift pointing to the children attaining twenty-one or being married in order to attain vested interests. So that there is nothing in *Gorringe* v. *Mahlstedt* (1) to impugn the authority of *Loring* v. *Thomas* (2), and Mr. Lawrence says that the latter decision was recognized by the House of Lords as an existing authority in *Barraclough* v. *Cooper*. (3)

In my opinion, therefore, the present case falls within *Loring* v. *Thomas* (2), and the child or children of a nephew or niece already dead at the date of the will must be included in the class entitled to share in the residuary estate of the testatrix.

Solicitors: *J. W. Asprey; Waller & Co.*

R. M.

NOTE.

February 20, 1905.

[HOUSE OF LORDS.]

BARRACLOUGH AND ANOTHER . . . . . APPELLANTS;

AND

COOPER . . . . . RESPONDENT.

THOMAS CROOK, by his will dated August 25, 1873, appointed trustees and executors thereof and devised to them his trust and mortgage estates, and after certain specific and pecuniary bequests devised and bequeathed all the residue and remainder of his real and personal estate, effects, and property whatsoever and wheresoever unto his trustees on trust as to his residuary personal estate for conversion and investment of the proceeds thereof as therein mentioned, and to stand possessed of the whole of his residuary real and personal estates upon trust out of the rents, profits, and income thereof to pay to his wife an annuity of 2000*l.* per annum during her widowhood, and a reduced annuity for her life in the event of her second marriage,

(1) [1907] A. C. 225. (2) 1 Dr. & Sm. 497.
(3) See note below.

EVE J.
1908
LAMBERT, *In re.* CORNS *v.* HARRISON.

and subject thereto during the life of his wife to stand possessed of the surplus rents, profits, and income thereof in trust for his children in equal shares, such respective shares to be absolutely vested as therein mentioned, and if any of his children "shall have died in my lifetime or shall die after my decease in the lifetime of my said wife leaving issue any of whom shall be living at the respective times of vesting aforesaid such issue then living shall take and equally amongst them if more than one the share which their respective parents would have taken if then living"; and from and after the decease of his wife the testator directed that his trustees should stand seized of certain portions of his real estate upon trust for his four children therein named and their children as therein mentioned, and should stand seized of a further portion thereof upon trust to pay the rents and profits thereof to his granddaughter, the respondent Mary Ann Upham Crook Cooper, during her life for her separate use without power of anticipation, and after her death the testator directed that the same hereditaments should fall into and constitute part of his residuary estate and be disposed of accordingly. And from and after the decease of his wife the testator directed that his trustees should stand seized and possessed of the whole of his real and personal estates the trusts whereof were not thereinbefore declared, or being declared should fail to take effect, upon trust to sell his real and leasehold estates and to stand possessed of the net moneys to arise from the sale and conversion thereof and of his personal estate upon trust for his children in equal shares, the share of each daughter to be settled as therein mentioned, and the testator then provided as follows: "I declare that if any child of mine shall die in my lifetime and any issue of such child shall be living at my decease then the shares as well accruing as original to which the child so dying would if living at my decease have been entitled of and in my residuary real and personal estate directed to be sold and converted as aforesaid shall be held by my trustees upon such trusts and subject to such provisions as the same would have been held if such child had died immediately after my decease."

The testator died on November 23, 1873, leaving the four children who were named in the will surviving him. Another child died in the testator's lifetime and before the date of his will leaving an only child, the respondent Mary Ann Upham Crook Cooper, named in the will.

The testator's widow died on December 13, 1901.

The trustees of the will took out an originating summons, *In re Crook; Crook* v. *Barraclough* [1903 C. 212], for the determination (inter alia) of the question whether at the death of his widow the testator's residuary real and personal estate (subject as to the specifically mentioned portions of his real estate to the trusts concerning the same in the will declared) became divisible in equal fourth shares between the defendants, his four children, or in equal fifth shares between the said defendants and the defendant Mary Ann Upham Crook Cooper.

The summons came on for hearing before Kekewich J., who by an order dated April 29, 1903, declared (inter alia) that the testator's residuary real and personal estate on the death of his widow became divisible in equal fourth shares between his four children.

The respondent appealed from this part of the order, and the appeal came on for hearing on November 30, 1903, and the following considered judgment of the Court of Appeal (Lord Alverstone C.J., Vaughan Williams L.J., and Romer L.J.) was delivered by Romer L.J. on December 18, 1903, allowing the appeal.

ROMER L.J. In my opinion this case cannot substantially be distinguished from and is governed by *Loring* v. *Thomas* (1), a decision of Kindersley V.-C., and one now of established and undoubted authority. In each case the original gift in the will in question is to a class of persons to be ascertained at the death of the testator, while the subsequent provision in favour of issue is not properly speaking a substitutional gift, but makes an addition to the class of persons taking under the original gift by reference to the issue of what I may call certain hypothetical persons. For instance, in the present case the provision in favour of issue is (shortly stated) as follows: "I declare that if any child of mine shall die in my lifetime and any issue of such child shall be living at my decease then the share to which the child so dying would if living at my decease have been entitled shall be held by my trustees upon such trusts as the same would have been held if such child had died immediately after my decease." In the will in *Loring* v. *Thomas* (1), as in the will in the present case, there is the difficulty arising from the use in the provision in favour of the issue of the expression "shall die in my lifetime" instead of "shall have died," but the Vice-Chancellor points out why that is insufficient to alter his decision, and his reasons need not be repeated by me. Therefore in the main provisions of the will, that is to say the original gift and the subsequent provision in favour of issue, the present cannot be distinguished from the case of *Loring* v. *Thomas*. (1) Indeed in the latter case the Vice-Chancellor had to consider difficulties in the way of his construction which do not occur in the present. I gather from the judgment of Kekewich J. in this case that he adopted this view. But he appears to think there are other parts of the will sufficient to distinguish this case and to lead to the conclusion that the appellant is not entitled to share in the residue inasmuch as her parent predeceased the testator. I cannot share his view in this.

There are only two considerations arising from other provisions in the will which are said to support the view adopted by the learned judge, and I may observe that these provisions in no wise directly concern or relate to what I have called the main provisions affecting the gift of residue in favour of issue.

One consideration is that the testator in a part of his will concerning another gift, and where he had in view another though, it may be, a somewhat analogous object, uses the phrase "shall have died" and not "shall die." But it appears to me not right to infer from this that the testator in the gift of residue to issue by the words "shall die" must have intended something different from "shall have died."

The other consideration is that the testator in his specific gifts has

(1) 1 Dr. & Sm. 497.

EVE J.
1908
LAMBERT, *In re.* CORNS *v.* HARRISON.

distinguished the appellant (his granddaughter) from his daughters, he being well aware of the fact that the mother of the appellant was dead at the date of the will. This appears to me to have no real bearing on the point we have to decide.

In my opinion the appeal should be allowed and it should be declared that the appellant is entitled to a share in the residue.

The defendant Emily Jane Long Barraclough, one of the testator's daughters, and her son Harry Barraclough then appealed to the House of Lords against the order of the Court of Appeal in so far as it varied the previous order of Kekewich J., and the appeal now came on for hearing.

P. O. Lawrence, K.C., and *George Lawrence*, for the appellants.
Warrington, K.C., and *E. P. Hewitt*, for the respondent.

EARL OF HALSBURY L.C. My Lords, speaking for myself, I must say that I am not fired with that ambition which appears to have prevailed in the mind of Malins V.-C. that it is possible to put the law into a perfectly satisfactory condition and to invent some canon of construction which shall prevent disputes over a will. I repudiate the invocation of any canon of construction here beyond the fact that I find enough in the language of this instrument to shew what was the meaning of the testator, and I propose to give effect to what in my view the testator meant.

I entertain no doubt that what the testator meant to do was to treat all his children equally. It has been pointed out, no doubt, that there was a special provision with respect to the one sought to be left out in the course of this discussion; but to my mind the circumstances are quite sufficient to explain what the testator meant in that respect. The person in respect of whom the question arises here was left motherless, but what the circumstances were and what was the condition of things with which the testator had to deal at that time do not appear. It is enough to say that what the learned judge, Kekewich J., thought was a strange thing, namely, that at the end of the life estate the amount of interest in the will which had been given, instead of being disposed of otherwise, passed to the residue, seems to me not at all to be a strange thing, given the intention which I attribute to the testator. For, the view that he intended to make a special provision for one whose circumstances were peculiar, and then to pass what remained after the life estate into residue so that they might all share alike, seems to me to be a very intelligible view.

My Lords, as I have already said, I repudiate any kind of canon of construction applying to this will, and it seems to me that the last thing one ought to do would be to attempt to make a canon of construction which could guide the Court in interpreting all wills. That is certain to lead to error. There are some technical phrases, and there are some phrases which have become almost technical, having received a construction, with regard to a will, which we cannot get rid of; but I cannot help thinking that half the disputes arise from a consideration of what these canons of construction mean unaffected by the circumstances of each particular case. If you lay

down a canon of construction which is supposed to meet every case, you are absolutely certain to go wrong.

Under these circumstances, my Lords, so far as it depends at all on a canon of construction, I am quite contented with what Romer L.J. said on the subject. But, as I say, I am quite satisfied as to what was the real meaning of the testator. I think he has expressed it in language which certainly was capable of improvement, and I cannot agree with Kekewich J. in saying that the will was skilfully or carefully drawn. I think on the contrary it is carelessly drawn. But whatever may be the character attributed to it, I think through it all I can see what was the meaning of the testator; and that is what I give effect to. Under these circumstances, without saying more, I propose to your Lordships to dismiss the appeal with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I quite agree with the view of the Court of Appeal expressed by Romer L.J. I think upon the face of this will it is pretty plain that the testator intended this grandchild to take a share of the residue. The only words in the will upon which an argument in the opposite direction can be founded are the words "shall die," importing futurity. These words have always been construed as not creating any serious difficulty. They were not considered in *Christopherson* v. *Naylor* (1) as creating a difficulty. In *Loring* v. *Thomas* (2) they were not considered as creating any difficulty at all, and what fell from the Vice-Chancellor upon that point seems to me to be a very strong argument in favour of his view.

My Lords, I agree entirely with the Lord Chancellor that the expressions in the will on which Kekewich J. relied do not really create any difficulty at all. Without a clear expression of intention on the part of the testator, I should not attribute to him such a whimsical and, if I may say so, cruel result as that derivable from the earlier part of the will. It seems to me it would be very unnatural that the testator should have provided for the lady during the lifetime of his widow—that he should have made a special provision for her at that time, and then, after having contemplated that she was very likely to marry, he should have left her without the possibility of making any provision for her children.

My Lords, I do not propose to trouble your Lordships with any reference to authorities except that I should like to read a passage from the judgment of Kindersley V.-C. which expresses very clearly the principle upon which I think wills of this kind ought to be construed.

The Vice-Chancellor in *Loring* v. *Thomas* (3) says this: "Now, of course the question is one entirely of intention, and it is obvious that in cases of this kind a testator may mean to *include* as objects of his bounty, or he may mean to *exclude*, the issue of the predeceased children. When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child, and take the share which their parent would have taken if living, he may intend such representation or substitution to apply only to

(1) (1816) 1 Mer. 320. (2) 1 Dr. & Sm. 497.
(3) 1 Dr. & Sm. 510.

EVE J.
1908
LAMBERT, *In re.* CORNS *v.* HARRISON.

the case of a child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of a child who was already dead at the date of the will. The solution of the question, which of the two he intended, must of course depend on the language he has used in directing such representation or substitution. He may use language of such restricted import as to be inapplicable to any children but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both." That is exactly, I think, what the testator has done in this case.

I concur in the motion proposed by the Lord Chancellor.

LORD LINDLEY. My Lords, I am also of opinion that the view taken of this will by the Court of Appeal is right.

Apart from the difficulty introduced by the expression "shall die," there is no difficulty at all. The words "shall die" are an old phrase that has been treated over and over again as equivalent to "shall be dead." As long ago as Lord Coke's time we find it stated by him that as *procreatis* shall extend to issue which may be begotten, so *procreandis* shall extend to issue already begotten. There is no magic in the words; you must look and see what is meant. And when you look at this will as a whole, to cut out this granddaughter from a share of the residue appears as plainly as possible to be the very thing that this testator did not intend. If you look at the will you see what pains he took to provide for this lady; and in consequence only of the expression "shall die," which I have commented upon, there is no reason whatever for defeating the intention which I conceive runs plainly through the whole of the will from beginning to end.

I think the appeal ought to be dismissed, and inasmuch as the view which the House takes is that which has been acted upon for close upon forty years, I think the appeal ought to be dismissed with costs.

Solicitors: *Bower, Cotton & Bower, for Longbotham & Sons, Halifax; Stow, Preston & Lyttelton, for Leslie C. Wintle, Eastbourne.*

R. M.

DANSK REKYLRIFFEL SYNDIKAT AKTIESELSKAB v. SNELL. (1)

NEVILLE J.

1908

Feb. 19, 20; *March* 4, 13.

[1907 D. 330.]

Patent—Contract for Sale—Consideration, in part Royalties—Assignment of Patent—Sub-sale—Vendor's Lien for Unpaid Royalties—Breach of Contract—Damages—Election—Bankruptcy of Defendant—Motion for Judgment against Defendant not appearing—Costs—Practice.

In 1904 the plaintiffs agreed to sell S. some patents, and, as the consideration for the sale, S. agreed to pay them a sum of 5000*l.* cash and certain royalties, and S. also guaranteed the payment of certain annual sums by way of minimum royalties during the continuance of the patents, the first payment to be made in June, 1906, and if default were made in payment of any minimum royalty the whole of the minimum royalties were to become immediately payable. S. paid the 5000*l.*, and the plaintiffs by two deeds in common form assigned the patents to him for a nominal consideration and without reference to the agreement or any reservation of royalties. In 1905 S. sold and assigned the patents for value to a company with notice of the agreement of 1904, and the company paid the plaintiffs the minimum royalty that fell due in June, 1906. Subsequently S. wrongfully repudiated the agreement of 1904, and the plaintiffs brought an action against him and the company, alleging that S. by his wrongful repudiation had committed a breach of the agreement which entitled them "to treat it as at an end and to sue him in damages for the breach," and claiming, as against S., the total sum of the unpaid minimum royalties by way of damages for the breach, and, as against the company, a lien on the patents for the royalties as unpaid purchase-money. Subsequently S. became bankrupt, and his trustee in bankruptcy was added as a defendant but declined to take any part in the action. The company pleaded that the plaintiffs, having elected to treat the agreement as at an end, had no claim for royalties thereunder against them:—

Held, that the plaintiffs had not by their pleadings irrevocably elected to rescind the agreement, but could not sue both in damages for the breach and also for the consideration.

Held, also, following *Werderman* v. *Société Générale d'Électricité*, (1881) 19 Ch. D. 246, as explained in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, that the plaintiffs had a vendor's lien on the patents in the hands of the company for the unpaid minimum royalties.

Held, also, that the plaintiffs were entitled, as against S., to an account

(1) This report has been delayed in consequence of an appeal having been entered, which was afterwards withdrawn by consent.

NEVILLE J.

1908

DANSK REKYL-RIFFEL SYNDIKAT AKTIESEL-SKAB v. SNELL.

of the royalties payable under the agreement of 1904 and to prove in his bankruptcy for the amount found due on the account.

Form of order as to costs when an action comes on for trial against one defendant, and on motion for judgment against another defendant who has not appeared to the writ or does not appear at the trial, and the plaintiff recovers judgment against both with costs.

ACTION.

By an agreement dated June 4, 1904, and made between the plaintiffs (therein called "the vendors") of the first part, one J. T. Schoube of the second part, and the defendant Snell (therein called "the purchaser") of the third part, it was (so far as material to this action) agreed as follows:—

"1. The vendors agree to sell and the purchaser agrees to purchase the letters patent specified in the schedule hereto for or relating to automatic machine guns (mitrailleuses), automatic rifles, and automatic pistols, and their accessories, to which the vendors are entitled, and also the full benefit of the inventions comprised in such letters patent for the United Kingdom and its Colonies. . . . ."

"3. The consideration for the said sale shall be the sum of 5000*l.*, which shall be paid by the purchaser to the vendors on the completion of the purchase, and as further consideration for the said sale the purchaser shall pay to the vendors during the continuance of the said respective letters patent the following royalties, viz.:—a royalty of 12 per cent. on the net wholesale selling price of all machine guns manufactured under any of the said letters patent and sold by him. A royalty of $3\frac{1}{2}$ per cent. upon the net wholesale price of all automatic rifles manufactured under any of the said letters patent and sold by him. A royalty of 7 per cent. upon the net wholesale selling price of all automatic pistols manufactured under any of the said letters patent and sold by him . . . . The purchaser guarantees that the vendors shall receive for the period ending the first day of June, 1906, in respect of royalties, the sum of 1000*l.* at the least, and for the year ending the first day of June, 1907, the sum of 1500*l.* at the least, and for each of the following years ending the first day of June up to and including the first day of June, 1914, the sum of 2000*l.* at the least, and that, if the royalties shall not amount to these respective sums, he will, on the said respective

dates, pay to the vendors any balance that may be necessary to make up such sums. Provided always and it is hereby expressly agreed and declared that, if any of the aforesaid minimum sums to be paid in respect of royalties shall be unpaid for the space of three calendar months after they shall become due, the vendors shall thereupon become entitled to the whole of the amounts which would become payable to them in respect of royalties calculated up to the said first day of June, 1914, and such sum shall thereupon be paid to them by the purchaser. . . . ."

Clause 4 gave the purchaser an option (which was not exercised) to compound for all the above royalties by a cash payment to the vendors of the sum of 20,000*l.*

" 6. All the said royalties shall be payable by half-yearly payments on the 31st day of May and the 30th day of November in each year, the first payment to be made on the 31st day of May, 1906, and the purchaser shall keep accurate books of account shewing the number of weapons and articles manufactured and sold by him and the prices thereof and other necessary details, and such books shall be open to inspection by the vendors or their agents at all reasonable times."

Clause 7 provided for the completion of the purchase on June 4, 1904, and that on payment of the 5000*l.* the vendors would " at the request and cost of the purchaser execute to him a proper assignment of the said letters patent and obtain the concurrence therein of all necessary parties. . . . ."

" 9. If the purchaser shall transfer this agreement and the benefit thereof to a company to be formed under the laws of England, and if the purchaser or such company shall thereupon or at any later time pay to the vendors the sum of 5000*l.* in respect of royalties in advance or of the lump sum of 20,000*l.*, as the case may be, and the company without expense to the vendors shall enter into an agreement with them to observe and perform all the provisions of this agreement on the part of the purchaser thenceforth to be observed and performed, then, if the purchaser shall have paid to the vendors the sum of 5000*l.* mentioned in clause 3 hereof, and shall have duly performed and observed all the obligations on his part under this agreement

NEVILLE J. down to the time of such transfer, he shall be discharged from all future obligations under this agreement.

1908

DANSK REKYL RIFFEL SYNDIKAT AKTIESEL-SKAB v. SNELL.

"10. The purchaser shall pay all fees which shall become due and payable in respect of the said letters patent after the date hereof . . . . and shall use his best endeavours to maintain the same in full force."

On the same June 4, 1904, the defendant Snell paid the plaintiffs the 5000*l.*, and the patents were assigned to him by two deeds in common form which on the face of them respectively stated the nominal consideration of 10*s.*, and reserved no royalties nor contained any reference to the agreement.

By an agreement dated April 3, 1905, and made between the defendant Snell (as vendor) of the one part, and the defendants, the Rexer Arms Company, Limited, of the other part, after reciting that the now stating agreement was supplemental to the agreement of June 4, 1904 (thereinafter called the principal agreement), and that since the date of the principal agreement the defendant company had been formed under the Companies Acts, 1862 to 1900, with the capital therein mentioned, with a view (amongst other things) to the acquisition of the patents specified in the principal agreement, and that since the date of the principal agreement the patents therein specified had been assigned to the vendor, and that the articles of association of the defendant company provided that the company should immediately after its formation enter into an agreement in the terms of a draft therein referred to, being a draft of the now stating agreement, it was agreed as follows :—

By clause 1 the vendor agreed to sell to the defendant company the letters patent specified in the principal agreement, and "the full benefit of the principal agreement and all the rights and interest of the vendor thereunder."

Clause 2 stated the consideration for the sale to be paid in cash and shares by the defendant company.

Clause 3 provided for the completion of the purchase on or before May 30, 1905.

"(7.) The company shall on completion covenant with the vendor thenceforth to pay all the royalties and other sums payable under and duly perform and observe all the provisions

contained in the principal agreement and on the part of the vendor to be performed and observed and to indemnify and keep indemnified the vendor from and against all actions proceedings claims demands costs charges and expenses in respect of the principal agreement."

The agreement of April 3, 1905, was carried into effect, and on May 3, 1905, the defendant Snell assigned to the defendant company the patents by two deeds in common form.

On August 10, 1906, the defendant company paid to the plaintiffs the minimum royalty of 1000*l.* payable by the defendant Snell on June 1, 1906, under the principal agreement.

On December 19, 1906, the defendant Snell by his solicitors wrote to the plaintiffs purporting to repudiate the principal agreement on the ground that he had been induced to enter into it by untrue representations.

In December, 1906, the plaintiffs commenced an action against the defendant company alone, in which they claimed a vendor's lien on the patents in respect of the royalties payable under the agreement of June 4, 1904; and in March, 1907, they commenced the present action, in the first instance against the defendant Snell alone, claiming damages against him for breach of the same agreement. Pursuant to an order made on June 24, 1907, in the present action, the first action against the defendant company was discontinued and they were made defendants to the present action. By their amended statement of claim the plaintiffs alleged (par. 4) that the defendant Snell had wrongfully repudiated the agreement of June 4, 1904, and (par. 5) by such repudiation had committed a breach of the said agreement and entitled the plaintiffs "to treat the same as at an end and to claim immediate payment by him of damages for such breach," and their particulars of the damages comprised, inter alia, 15,500*l.*, being the total amount of the unpaid minimum royalties. They also alleged that since April 3, 1905, the defendant company had manufactured and sold quantities of automatic machine guns, rifles, and pistols under the same agreement, and (par. 9) that the royalties payable under the same agreement were part of the purchase consideration; and they claimed, as against the defendant Snell, damages for the breach of the agreement of

NEVILLE J. 1908 DANSK REKYL-RIFFEL SYNDIKAT AKTIESEL-SKAB v. SNELL.

June 4, 1904, and, as against the defendant company, a declaration that they were entitled to a lien or charge on the patents sold by the said agreement of June 4, 1904, in respect of the unpaid consideration payable thereunder, and to have the said charge enforced by foreclosure or sale. The defendant Snell by his defence alleged that the agreement of June 4, 1904, had been obtained by untrue representations, and he counter-claimed for rescission. Subsequently, in September, 1907, he was adjudicated bankrupt on his own petition, and his trustee in bankruptcy, who was made a defendant to the action, declined to take any part in it.

The defendant company by their defence raised the following points of law:—(1.) That upon the true construction of the agreement of June 4, 1904, the plaintiffs were not entitled to any vendor's lien upon any letters patent which in pursuance of that agreement had been transferred by the plaintiffs to the defendant Snell, or by him to the defendant company. (2.) That upon the true construction of the same agreement no royalty was payable except in respect of articles sold by the defendant Snell. (3.) That, in view of the election of the plaintiffs by their statement of claim to treat the same agreement as at an end, they were precluded from making any claim for royalties thereunder as against the defendant company or as against any letters patent vested in them.

The action now came on for trial against the defendant company, and on motion for judgment against the defendant Snell and his trustee in bankruptcy, neither of whom appeared.

Jenkins, K.C., and *Fischer Williams*, for the plaintiffs. Under clause 3 of the agreement of 1904 the royalties are part of the consideration for the sale of the patents and are really unpaid purchase-money, and the plaintiffs, as the owners and vendors of the patents, have a continuing interest in the patents, and are entitled to a lien upon them in the hands of the company, who are assignees with notice, for the unpaid purchase-money: *Werderman* v. *Société Générale d'Électricité* (1); *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2) The definition of

(1) 19 Ch. D. 246. (2) [1902] 1 Ch. 146, 157

"royalty" in Webster's Dictionary, 1890 ed. p. 1256, sub-heads 7 and 8, supports this view. We rely also on the covenant to keep up the patents. The mere fact that part of the purchase-money is made payable by instalments spread over a number of years does not destroy the vendor's lien: *Winter* v. *Lord Anson* (1); *Matthew* v. *Bowler*. (2) The scheme of the agreement of 1904 is that the purchase-money shall be an immediate cash payment of 5000*l*., and a further deferred payment of at least 16,500*l*. more by instalments made up of the minimum royalties, which are in exactly the same position as the 5000*l*. We shall be satisfied with a charge for the minimum royalties. Suing Snell in damages for his breach of contract is not under the circumstances rescinding the contract: *Hochster* v. *De la Tour*. (3) The plaintiffs are entitled to judgment against Snell for 15,500*l*., the amount of the unpaid minimum royalties, as damages for his breach of contract, and they are also entitled, as against the company, to a lien on the patents for the same amount as unpaid purchase-money.

Peterson, *K.C.*, and *Clauson*, for the company. The plaintiffs are claiming inconsistent relief. By their statement of claim they have elected to treat the agreement of 1904 as rescinded, and cannot now sue Snell in damages for the breach of it and also claim a lien on the patents for unpaid purchase-money: *Johnstone* v. *Milling* (4); *Jones* v. *Carter* (5); *Serjeant* v. *Nash, Field & Co.* (6); *Clough* v. *London and North Western Ry. Co.* (7); *Foulkes* v. *Quartz Hill Consolidated Gold Mining Co.* (8); *Scarf* v. *Jardine* (9); *Tomlin's Case*. (10)

[NEVILLE J. Having regard to the manner in which this litigation was commenced, I should be very loath, without direct authority on the point, to hold that the plaintiffs have elected to treat the contract as rescinded. I do not think they have, but if necessary I will give leave to amend.]

Then as to the construction of the agreement. The vendor's lien does not arise in every case, but depends on the circumstances

(1) (1827) 3 Russ. 488.
(2) (1847) 6 Hare, 110.
(3) (1853) 2 E. & B. 678, 685.
(4) (1886) 16 Q. B. D. 460, 467.
(5) (1846) 15 M. & W. 718.
(6) [1903] 2 K. B. 304.
(7) (1871) L. R. 7 Ex. 26, 35.
(8) (1883) Cab. & E. 156.
(9) (1882) 7 App. Cas. 345, 360.
(10) [1898] 1 Ch. 104.

NEVILLE J. 1908 DANSK REKYLRIFFEL SYNDIKAT AKTIESELSKAB v. SNELL.

of each case, *Dixon* v. *Gayfere* (1), and may be excluded by the nature of the contract: *In re Brentwood Brick and Coal Co.* (2) Here there is no vendor's lien. There is no privity of contract between the plaintiffs and the company: *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3); and there is nothing to indicate a vendor's lien or charge on the patents for the royalties, but only a liability, personal to Snell, to pay certain royalties, and a personal guarantee by him to pay certain minimum royalties. Moreover, clauses 7 and 9 negative the vendor's lien. By clause 7 Snell, on payment of 5000*l.*, was to have a free conveyance of the patents, and all the other obligations under the agreement are personal to him; and by clause 9 the parties contemplate an assignment to a company. Then the plaintiffs by their deeds of assignment convey "as beneficial owners," and that precludes them from setting up a charge for the royalties because it is against their implied covenants against incumbrances and for quiet enjoyment. Further, a continuing charge up to 1914 would greatly hamper assignees in selling and granting licences of the patents.

Jenkins, K.C., in reply. There has been no election to rescind the agreement. It is still subsisting.

[NEVILLE J. I doubt if you can sue Snell in damages for the breach of the agreement and also the company for the consideration.]

Snell wrongfully repudiated the agreement, and we are entitled to damages for that breach. But if necessary we ask to amend by claiming an account of the royalties against him. On the merits, clause 9 shews that the parties contemplated an assignment to a company and that the royalties should run with the patents and give the vendors a continuing interest in the property. The onus is on the defendants to prove that the vendor's lien has been lost. *In re Patent Carriage Co.* (4) shews that a vendor's lien can exist in the case of a patent. The legal assignment of the patents to Snell was for the nominal consideration of 10s., which shews that the parties considered the real consideration was defined by the agreement.

Cur. adv. vult.

(1) (1857) 1 De G. & J. 655, 660.
(2) (1876) 4 Ch. D. 562.
(3) [1902] 1 Ch. 146.
(4) (1866) L. R. 2 Eq. 349.

March 4. NEVILLE J. By an agreement dated June 4, 1904, the plaintiffs agreed to sell to the defendant Snell certain letters patent therein mentioned in consideration of 5000*l.* down and certain royalties in respect of articles manufactured under the letters patent and sold by the purchaser. The purchaser guaranteed that the plaintiffs should receive in respect of royalties certain minimum annual payments up to June 1, 1914, and agreed to make up the royalties to these annual sums. If any of the minimum sums to be paid in respect of royalties should be unpaid for the space of three calendar months after they should become due, the whole of the minimum royalties became immediately payable. The agreement was followed by an assignment of the letters patent for a nominal consideration to the defendant Snell. On May 3, 1905, Snell assigned the patents to the defendants, the Rexer Arms Company (Limited), the consideration mentioned in the deed being 5*l.* On June 30, 1905, the defendant company gave the plaintiffs notice of the assignment, and on August 10, 1906, paid the plaintiffs the minimum royalty of 1000*l.* then due. No payments in respect of the consideration reserved in the agreement of June 4, 1904, have since been made. By a letter dated December 19, 1906, the solicitors for the defendant Snell, on his behalf, repudiated the agreement on the ground that it was obtained by untrue representations, and on March 5, 1907, the plaintiffs issued the writ in this action against Snell, claiming an account of royalties due under the agreement of June 4, 1904, and payment, having previously commenced an action against the defendant company claiming a lien. The writ in this action was subsequently amended by adding the company as defendants, and claiming (amongst other things) a declaration of lien, and the earlier action against the company was subsequently abandoned. Snell became bankrupt, and the proceedings were continued against his trustee. The principal question to be determined is whether the plaintiffs are entitled, as against the defendant company, to a lien or charge upon the patents in respect of the royalties reserved by the agreement. *Werderman* v. *Société Générale d'Électricité* (1), as explained in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic*

(1) 19 Ch. D. 246.

NEVILLE J. 1908 DANSK REKYLRIFFEL SYNDIKAT AKTIESELSKAB v. SNELL.

Tyre Co. (1), shews that, where the intention of the parties to such an agreement as this is so expressed, an assignee of the patents with notice of the agreement holds them subject to the payment of the consideration reserved. To use the words of Sir George Jessel (2): "It is a part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability." The obligation to fulfil the terms of the agreement, being with regard to the assignees not personal, but attached to the property which they acquired with notice of the terms upon which it was held by their assignor, disables them from holding the property without fulfilling the terms. It appears to me that such an interest of the vendor, if not properly described as a vendor's lien, is closely analogous to it. The question involved is whether, upon the true construction of the original assignment, it was intended that the vendor should retain a charge upon the property or that he should part with the property completely, looking solely to the personal liability of the purchaser to pay the consideration. That a vendor's lien may exist in such a case, see *In re Patent Carriage Co.* (3) In the present case the provisions of clause 10 with regard to the maintenance of the patents indicate to my mind the reservation of an interest in the vendors, while the assignment of the property for use and not on the face of the agreement for the market, and the reservation of royalties as part of the consideration, appear to me to point in the same direction. I think that upon the true construction of the present agreement the plaintiffs have a lien upon the patents in the hands of the defendant company.

The next question is to what does the lien extend? The purchaser is under no obligation to work the patents, and the specific royalties are reserved only in respect of articles sold by him, his assigns not being mentioned; I think, therefore, that by the agreement the consideration does not extend to royalties payable in respect of articles sold by his assigns, but must be confined to the minimum royalties payable by the purchaser. At the date of the issue of the writ a minimum royalty had not been in

(1) [1902] 1 Ch. 146. (2) 19 Ch. D. 252.
(3) L. R. 2 Eq. 349.

arrear for three months, but I think this would not disentitle the plaintiffs to an account which would extend to what was due at the time of taking the account. With regard to this, no point was insisted upon by the defendant company.

It was argued that by paragraphs 4 and 5 of the plaintiffs' amended statement of claim the plaintiffs had irrevocably elected to treat the contract as at an end and could not afterwards sue the defendant company to enforce a lien arising under it. I considered that this was not so, and gave leave to amend should I be of opinion that amendment was necessary. There is no personal liability on the defendant company's part to pay the consideration, and the lien exists only so long as some part of the consideration remains due to the plaintiffs. Upon repudiation by Snell, the plaintiffs were entitled to treat the agreement as broken and sue for the breach: see per Bowen L.J., in *Johnstone* v. *Milling* (1); or they could, I think, sue for the consideration as a debt, but they cannot recover on the ground of both damages and debt. It appears to me, therefore, that, as they desire to enforce the lien, the plaintiffs' claim against Snell must be for the consideration, that is, for an account of what is due to the plaintiffs from the defendant Snell in respect of the royalties payable under the agreement of June 4, 1904. I think, however, that such relief can be given upon the claim as it stands and that no amendment is necessary. I will make a declaration that upon the true construction of the agreement of June 4, 1904, and in the events which have happened the plaintiffs are entitled to a lien upon the patents assigned to Snell in respect of the royalties payable by him under that agreement; there must be an inquiry what is due to the plaintiffs for royalties in respect of articles manufactured under the patents and sold by Snell, and for minimum royalties, with liberty to prove in Snell's bankruptcy for the amount found due from him on taking the account, and with liberty in case such amount is not paid to apply for the enforcement of the lien. The defendants must pay plaintiffs' costs of action, and the counter-claim must be dismissed with costs.

March 13. The action was mentioned to-day on the question of costs.

(1) 16 Q. B. D. 460, 473.

NEVILLE J. 1908 DANSK REKYL-RIFFEL SYNDIKAT AKTIESEL-SKAB v. SNELL.

NEVILLE J. In this case the plaintiffs succeeded in their action against two of the defendants, against one of whom judgment was obtained on motion for judgment, and against the other after the trial of the action. The plaintiffs are entitled to their costs; and the question is what form under those circumstances the order as to costs should take. I have consulted the senior taxing Master, and it appears that, according to the practice in the Chancery Division up to date, where some of the defendants do not appear or do not defend, and other defendants carry the action to trial and fail, the costs being given in the usual way in favour of the plaintiffs against the defendants, the whole of the costs are taxed against both defendants jointly, so that the defendant who has either not appeared to the writ or not put in a defence may be rendered liable by the action of his co-defendant, which he is powerless to prevent, to costs, which, of course, may amount to very considerable sums. It appears to me that this is an injustice, and that some alteration in the form of the order which is made in cases of that kind ought to be adopted, and the order that I propose to make is this: "The Court doth order that the plaintiffs recover their costs of action down to date of judgment, and that it be referred to the taxing Master to tax such costs and to certify how much thereof is properly attributable to the defendants jointly, and to each defendant separately, and that the respective defendants do pay to the plaintiffs the amount to be so certified." In the present case, the matter is additionally complicated by the fact that the defendant Snell became bankrupt, and the proceedings were ordered to be carried on as against his trustee in bankruptcy, but the trustee entered no appearance. Under those circumstances I think the costs ought not to be given against him personally, and that the order ought to be against the two defendants, Snell and the Rexer Arms Company, and that the plaintiffs should be at liberty to prove in the bankruptcy of Snell with regard to the costs.

Solicitors: *Stephenson, Harwood & Co.; Hays, Schmettau & Dunn.*

H. L. F.

LORD FITZHARDINGE *v.* PURCELL.

PARKER J.

1908

March 1, 4, 5, 6, 9, 10; *April* 13.

[1907 F. 432.]

Foreshore—Tidal and Navigable River—Wild Fowl—Right of Public to shoot Wild Fowl—Custom—Birds of Warren—Public Rights in Sea and Foreshore.

Action brought by the lord of certain manors adjoining the Severn, a tidal and navigable river, for trespass on the foreshore, parcel of the manors, in a boat and on foot, for the purpose of shooting wild duck. Defendant denied that the foreshore was parcel of the manors, and, even if it were, he claimed the right to go upon the foreshore and shoot and carry away wild duck on the ground of immemorial user, in four alternative ways: (1.) as a member of the public in exercise of a general right of all the King's subjects in and over the foreshore of a tidal navigable river; (2.) as one of the inhabitants of the manors by virtue of a trust or reservation in their favour which the Court would presume to have been created by the original grant of the manors to the plaintiff's predecessors in title; (3.) as an inhabitant of the manors, being a wild-fowler by occupation, by virtue of a custom of the manors; (4.) by prescription as a right in gross enjoyed by him and his ancestors:—

Held, on the evidence, that the plaintiff had proved his title to the foreshore as part of the manors, and also to a several fishery in the Severn. The public have no rights over the foreshore of a tidal navigable river, when not covered by the tide, except such as are ancillary to their rights of fishing and navigation in the sea. When covered by the tide the foreshore is part of the sea, and the only rights of the public in or over it are the rights of navigation and fishing and rights ancillary thereto. The right claimed to kill and carry away wild duck is—whether wild fowl are birds of warren or mere wild birds in which there is no property—a profit à prendre and cannot be claimed by custom, but *semble* wild duck are birds of warren.

Held, also, that there was not sufficient evidence of user to enable the Court to presume the existence of a trust, or to establish a prescriptive right.

Lord Fitzhardinge, the plaintiff in this action, was tenant for life of certain lands in the county of Gloucester, comprising the manors of Slimbridge, Hinton, and Ham, all of which were part of the manor or great manor of Berkeley. He claimed under grants alleged to have been made to his ancestors by Henry I. and confirmed by Henry II., Richard I.,

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

and James I. He alleged that the boundary of the said manors was the middle of the deepest channel of the river Severn, which is tidal and navigable at this point, and that the soil of the foreshore formed part of the manors. In the alternative he alleged that he and his predecessors in title were possessed of a several fishery in the river Severn, where that river adjoined the said manors, and that he and his predecessors had from time immemorial exercised rights of fishery by means of fixed engines between high and low water mark in the soil of the said river. He claimed a declaration that he was entitled to the foreshore as lord of the said manors, and an injunction to restrain the defendant from trespassing on the lands of the said manors. The trespass complained of was that the defendant went in a boat over the foreshore of the Severn, where it adjoined the said manors when covered with water, and on foot when it was not so covered, for the purpose of shooting wild fowl. The defendant admitted that the plaintiff was lord of the manors in question, but denied that the manors included any part of the foreshore of the Severn and that the plaintiff had any several fishery in the Severn. He claimed the right to kill and take away wild fowl on the ground of immemorial and uninterrupted user, and he put his claim in four different ways: (1.) He alleged that the Severn was a tidal and navigable river, that the soil of the bed of the river and of the foreshore was and always had been the property of the Crown, and that the defendant, as a member of the public, had a common law right in common with all the King's subjects to kill wild fowl on the foreshore of the said tidal navigable river whether covered with water or not, and that he and all other members of the public had from time immemorial resorted to the said foreshore for the purpose of wild-fowling without let or hindrance. (2.) In the alternative he alleged that, if the said foreshore had been granted to the plaintiff's predecessors in title by the Crown, it was granted subject to a trust or to a reservation of the right of the inhabitants of the said manors and the manor of Arlingham or of the great manor of Berkeley at all proper times to go upon the said foreshore for the purpose of killing wild fowl and taking them away. (3.) In the alternative he alleged a

custom of the said manors from time immemorial that the inhabitants of the said manors, being and following the occupation of wild-fowlers, were and always had been at full liberty to resort and go upon the said lands and upon the waters and foreshore of the river Severn within the said manors for the purpose of wild-fowling. (4.) In the alternative he claimed a prescriptive right in gross in himself and his ancestors to shoot wild fowl on the said lands.

There was evidence of the existence in ancient times in some parts of the river of a custom, called the custom of Gale, by which inhabitants were entitled to fish on condition of delivering half of the fish, or accounting for half the value, to Lord Fitzhardinge's predecessors, but the evidence as to the places where the custom prevailed was vague, and there was no proof of the exercise of the custom after the reign of James I.

Buckmaster, K.C., *R. Cunningham Glen*, and *Gatey*, for the plaintiff. The defendant claims a right to act as he has done, and it is necessary, therefore, for the plaintiff to establish his title to the soil of the foreshore. He is entitled to a several fishery at this place, and that is evidence of the ownership of the soil: *Rex* v. *Ellis* (1); *Attorney-General* v. *Emerson*. (2) But apart from this there is ample evidence of ownership. The boundary of the plaintiff's manors is the middle line of the deepest channel of the river Severn. The boundaries of the manors were proved in a case of *Attorney-General* v. *Smith*, referred to in Hale's De Jure Maris, which is incorporated in Stuart Moore, History and Law of the Foreshore, 3rd ed. pp. 402, 403. The plaintiff has exercised rights of ownership over the foreshore. He has used artificial means to retain land reclaimed from the river. He has sold part of it for the purpose of erecting a railway bridge. He and his predecessors have from time immemorial had fixed engines on the foreshore for catching fish. These rights were preserved by the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11. Certificates that these engines were privileged were given by the commissioners under the Salmon Fishery Act, 1865. The right to put up fixed engines is evidence of the ownership

(1) (1813) 1 M. & S. 652. (2) [1891] A. C. 649.

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

of the soil, and the Crown does not dispute the plaintiff's title. The documentary evidence is amply sufficient to justify the Court in presuming a grant by the Crown of a several fishery before Magna Charta: *Malcomson* v. *O'Dea.* (1) At that period the Crown had power to make such a grant to an individual: *Wilson* v. *Crossfield.* (2) The right of navigation does not carry with it a right of fishing or of shooting wild fowl any more than a right of walking on a public highway does: *Harrison* v. *Duke of Rutland.* (3) The public cannot by prescription or otherwise obtain a legal right of fishing in a non-tidal river even though it be navigable: *Smith* v. *Andrews.* (4) The right claimed by the plaintiff is a profit à prendre, and such a right cannot be claimed by custom, except in favour of copyholders; and it cannot be claimed by prescription in favour of a fluctuating and uncertain body such as the inhabitants of a place or the general public. Even if it could be so claimed, acts done by the public which are not objected to by the owner of the property on which they are done do not shew that the public have any right to do them: *Blount* v. *Layard.* (5) The foreshore belongs to the plaintiff, and the public have no right on it except to cross it in order to get to the sea; they cannot even walk along it: *Brinckman* v. *Matley.* (6)

Wild fowl are birds of warren, and neither the public nor the inhabitants of a particular place can prescribe for a right to kill them on another person's land: Viner's Abridgement, Prescription G., vol. xvii. p. 264.

Fox-Davies and *T. A. Pace*, for the defendant. The plaintiff has no right to restrain the defendant from shooting wild fowl. The present state of affairs has been going on for many years, and the shooting has never been interfered with. The boundary of the plaintiff's land is the high-water mark on his side of the river, and the fishing in the deepest channel has always been public. He is not the owner of a several fishery, but at most of a free fishery, and that does not carry with it any right to the soil. The evidence of the custom of Gale shews that it existed in the

(1) (1863) 10 H. L. C. 593.
(2) (1885) 1 Times L. R. 601.
(3) [1893] 1 Q. B. 142.
(4) [1891] 2 Ch. 678.
(5) [1891] 2 Ch. 681 n., 691 n.
(6) [1904] 2 Ch. 313.

reign of James I., and that is conclusive against the plaintiff having a several fishery. In *Attorney-General* v. *Emerson* (1) a grant of a fishery had to be presumed from acts of ownership; the terms of the grant were not known, and a further grant of the soil was presumed. That is not an authority in the present case. In *Duke of Somerset* v. *Fogwell* (2) it was held that a several fishery was an incorporeal hereditament and did not carry with it the ownership of the soil. The first suggestion that the boundary was usque ad filum aquæ appears in *Attorney-General* v. *Smith*, referred to in Hale's De Jure Maris. No judgment was pronounced in that case, and it cannot be accepted as an authority. But, even if the plaintiff is entitled to the soil of the foreshore, the defendant's rights are based on the same ground as was supported in *Goodman* v. *Saltash Corporation.*(3) Open and uninterrupted enjoyment from time immemorial under a claim of right is all that is necessary for the presumption that it had a lawful origin, if such an origin is reasonably possible in law. Here it is reasonably possible, for a right of wild-fowling is not a profit à prendre, and so may be acquired by custom or by prescription, for the lord of a manor may prescribe for himself, his tenants and farmers, to take wild fowl on the warren of another: *Davies' Case.*(4) The earliest grant which was produced to the Court appears to be in the nature of a confirmation. It is therefore necessary to infer an earlier grant, and the Court may fairly infer that it was subject to a trust or reservation of this right which has always been exercised by the public. Any rights of fishery which any one has in a tidal navigable stream are subject to the public rights of navigation: *Anon.* (5) The Severn is a tidal navigable river, and when covered with water is part of the sea. The defendant, as a member of the public, has a right to go in his boat anywhere upon it, and to moor his boat where he likes, subject to any right which the owner of the soil may have to be paid anchorage dues: *Blundell* v. *Catterall.*(6) The defendant had therefore a right to be on the foreshore, and, being lawfully there, he had a

(1) [1891] A. C. 649.
(2) (1826) 5 B. & C. 875.
(3) (1882) 7 App. Cas. 633, 639.
(4) (1688) 3 Mod. 246.
(5) (1808) 1 Camp. 517, n.
(6) (1821) 5 B. & Al. 268.

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

right to shoot any wild bird: *Hannam* v. *Mockett.* (1) Wild fowl are not birds of warren: see Co. Litt. 233a; *Duke of Devonshire* v. *Lodge* (2); Manwood, 1st ed. 1615, p. 40. They are mere wild birds, in which there is no property. The plaintiff has shewn no ground for an injunction.

[*Buckmaster, K.C.*, referred to *Wickham* v. *Hawker.* (3)]

That case only shews that rights of fowling may be reserved in respect of birds of warren. In the recent case of *Lord Chesterfield* v. *Harris* (4) Neville J. presumed, from long user, a grant of fishing right in a river not navigable to the freeholders of certain manors. In a navigable river a similar grant may be presumed to the public. If such a grant cannot be presumed, the defendant's right can be supported as a custom. The objection is suggested that fowling is a profit à prendre, but it is not so. In *Duke of Sutherland* v. *Heathcote* (5) Lindley L.J. defines a profit à prendre as "a right to take something off another person's land." Fowling does not come within that definition, and has never been held to be a profit à prendre. It is in the nature of an easement.

If it be a profit à prendre, the evidence is sufficient to establish a prescriptive right. There is no instance of any one having been stopped in the exercise of the right. A change in the manner of exercising it makes no difference: *Mercer* v. *Denne.* (6) The doctrine of prescription depends on acquiescence: see the opinion of Fry J., as he then was, in *Dalton* v. *Angus.* (7) Here acquiescence for thirty years is proved. [He also cited *Blewett* v. *Tregonning* (8); *Jenkins* v. *Harvey* (9); *Mills* v. *Colchester Corporation.* (10)]

Buckmaster, K.C., in reply. The several defences are inconsistent. The defendant has failed to prove any right to go upon the soil of the foreshore, and the plaintiff's possession would justify his action of trespass. But he also claims a declaration of title, and the evidence is ample to prove it. The right to a several fishery is prima facie evidence of ownership of the soil:

(1) (1824) 2 B. & C. 934.
(2) (1827) 7 B. & C. 36.
(3) (1840) 7 M. & W. 63.
(4) [1908] 1 Ch. 230.
(5) [1892] 1 Ch. 475, 484.
(6) [1905] 2 Ch. 538.
(7) (1881) 6 App. Cas. 740, 773.
(8) (1835) 3 Ad. & E. 554.
(9) (1835) 1 C. M. & R. 877, 894.
(10) (1867) L. R. 2 C. P. 476.

Hanbury v. *Jenkins*. (1) The language of the charters shews clearly that this was a several fishery; and apart from that the plaintiff's title is clearly proved. If the soil is the plaintiff's, the claim of the defendant that he has a right to shoot wild duck there fails altogether. The foreshore when uncovered is not a highway: *Brinckman* v. *Matley*. (2) When it is covered the only rights of the public are fishing and navigation; and the right of navigation is simply a right of way similar to the right of passage along a public road: *Orr-Ewing* v. *Colquhoun*. (3) No one could justify standing on the public road and shooting wood pigeon. A mallard has been said to be a bird of warren. *Rigg* v. *Earl of Lonsdale* (4) shews that there is property in grouse, which have been decided not to be birds of warren.

April 13. PARKER J. In this action an injunction is asked to restrain the defendant from trespassing on certain lands to which the plaintiff claims to be entitled and of which he claims to be in possession. The defendant denies that the plaintiff is entitled to or in possession of these lands. He says they belong to and are in the possession of the Crown, and further that, whether that be so or not, he has a right to enter thereon for the purpose of shooting wild fowl and to shoot wild fowl there, and to carry away and convert to his own use such wild fowl as he may so shoot. He has exercised this alleged right, and the exercise thereof is the trespass of which the plaintiff complains. An action of trespass is founded on possession, and in order to succeed the plaintiff must shew possession of the lands on which the acts complained of were committed at the date of such acts. If possession be shewn, the defendant is not at liberty to set up the title of a third party unless he justifies what he has done under a licence from such third party. When, however, as in the present case, a plaintiff in trespass, not being able to prove actual possession, proposes to shew possession at law by proving his title to the property, the defendant may, I think, shew, if he can, that the title is not in the plaintiff, but in some third party.

The lands on which the acts complained of by the plaintiff

(1) [1901] 2 Ch. 401.
(2) [1904] 2 Ch. 313.
(3) (1877) 2 App. Cas. 839.
(4) (1857) 1 H. & N. 923.

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

were committed are the lands between the high-water mark of ordinary tides and the middle of the deepest channel of the river Severn, so far as such river adjoins the three manors of Slimbridge, Hinton, and Ham. The Severn being a tidal navigable river, all these lands are prima facie the property of the Crown, and the plaintiff's title, if he has one, must be derived by grant from the Crown. This being so, when this action was first before me I suggested, having regard particularly to the fact that the plaintiff asks for a declaration of title, as well as for relief on the ground of trespass, that the plaintiff should communicate with the departments of Woods and Forests and the Board of Trade to ascertain whether either of those departments desired that the Attorney-General should be made a party to represent the Crown; but neither department so desired. At the trial the plaintiff endeavoured to prove his title to and possession of the lands in question by shewing that they were within the boundaries of the manors of Slimbridge, Hinton, and Ham—his title to and possession of which is admitted—or, alternatively, by shewing that he is entitled to a several fishery therein and thereover, together with the right to use fixed engines thereon, thus raising a presumption, on the principle of *Attorney-General* v. *Emerson* (1), that the soil is vested in him.

The three manors in question are all of them held in chief of the King. They are at times referred to as the members of the great manor, lordship, vill, borough, or barony of Berkeley, which appears to have been co-extensive with the hundred of Berkeley, and also to have been held in chief of the King. I will refer in this connection to two documents only. The first is the writ of livery of November 10, 1361 (Close Roll, 35 Edw. 3), whereby the King, after an inquisition of escheat—from which it appeared that Thomas de Berkeley, recently deceased, was tenant for life of (inter alia) the castle and manor of Berkeley and the manors of Slimbridge, Hinton, and Ham, and the hundred of Berkeley, all held of the King in chief by knight service, with remainder to his son Maurice de Berkeley in tail—directed the escheator to make livery of the same to Maurice de Berkeley accordingly. The second is the Chancery Inquisition of 42 Edw. 3, on the

(1) [1891] A. C. 649.

death of the same Maurice de Berkeley, wherein the jurors find that he died seised in fee tail of the castle and vill of Berkeley, with its members, namely (inter alia), Slimbridge, Hinton, and Ham. I am not at all clear what is exactly meant by referring to Slimbridge, Hinton, and Ham as members of the manor or vill of Berkeley. It is, however, not improbable that the subsidiary manors were first created possibly before the Conquest, and that the great manor, lordship, vill, or borough owed its origin to some re-grant or confirmation of the subsidiary manors, with additional franchises or privileges, and a local jurisdiction co-extensive with the hundred of Berkeley, which was, no doubt, a territorial unit in Saxon times. At any rate the manor of Berkeley is of very ancient origin, being mentioned in Doomsday Book.

The earliest document of title produced by the plaintiff is a charter of 1153, whereby Henry II., before he succeeded to the Crown, granted twenty librates of land in the manor of Berkeley to Robert, son of Harding. This Robert FitzHarding and his son Maurice about the same time entered into an agreement with one Roger de Berkeley, whereby Maurice was to take the daughter of Roger de Berkeley to wife, Maurice, with his father's consent, giving her the aforesaid twenty librates in dower, and Roger giving to Maurice, with his daughter, Slimbridge, which is said to be ten librates. In this agreement careful provision is made, in case Maurice should die before the marriage, for substituting another son of Robert in his place, and, if Roger's daughter should die before the marriage, for substituting another daughter of Roger in her place; also that the heir of Roger should marry one of the daughters of Robert. Eight honest men on Roger's part and eight on the part of Robert swear to see this agreement carried into effect, by force if necessary, and in consideration of the premises Roger releases whatever right he had in the farm of Berkeley. This contract is followed by two further charters of Henry II., executed before he became King, one in favour of the same Robert FitzHarding and the other in favour of his son Maurice, by each of which Berkeley and all Berkeley Herness Manor, with its appendages, is expressed to be granted. There are also two precisely similar charters of 1154 executed by

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

Henry II. after he succeeded to the throne. It is not quite easy to understand the foregoing transactions, but it is possible that Roger de Berkeley had incurred, or was alleged to have incurred, a forfeiture of all or some part of his inheritance to Henry, and that Robert FitzHarding, Henry's grantee, sought to quiet his title by intermarriages between his family and that of Roger. The double grants, first to Robert and then to Maurice FitzHarding, are, I am told, explained in the family on the ground that Robert was proposing at this time to enter into religion. He probably did not do so, for in the confirmation grant of Henry VII., hereinafter mentioned, it is the charter of Robert which is confirmed. The marriage between Maurice and a daughter of Roger seems to have taken place according to the contract. There does not appear to be forthcoming any original grant creating either the great manor of Berkeley or any of the subsidiary manors. Such royal charters as have been produced are in the nature of confirmations, and with the exception of the grant of James I., to which I shall presently refer in detail, do not afford much assistance in determining the boundaries of the great manor of Berkeley or of any of its subsidiary manors or the appurtenances belonging to the great manor or to any subsidiary manor. As is not unusual in confirmation grants, they merely confirm the existing state of things or the state of things existing in some previous reign. I will take the royal grant of 1154 as a type. By this Henry II. grants in one case to Robert, son of Harding, and his heirs, and in the other case to Maurice, son of Robert FitzHarding, and his heirs, Berkeley and all Berkeley Herness Manor as it was in the time of Henry I., with all its appurtenances in churches, in woods, in plains, in pasture, in waters, in ways, in paths, and in pleas, and in all things and events. The confirmation grants of Richard I. in 1198 and of Edward III. in 1330 are of the same type, except that Edward III. grants the return of writs in the hundred of Berkeley. The grant of Henry VII. in 1487 is a mere confirmation of previous grants, which are specifically referred to. In the year 1200 there is a grant by Robert de Berkeley to the monastery of the Blessed Mary of Kingswood of land in the Severn to make their fisheries

(which I think means land on which to fix their fishing engines), and also the free faculty of fishing in the water of Severn in breadth and length as far as the grantor's lordship (meaning no doubt the lordship of Berkeley) extends in the same water. This appears to point to part of the foreshore or bed of the Severn having in 1200 belonged to Robert de Berkeley as lord of the manor of Berkeley. But with this exception, until we come to the reign of James I., all or most of the evidence bearing on the questions at issue is contained in the records of the several subsidiary manors. Before, however, proceeding to consider these records, I ought to state that from the year 1491 to the year 1555 the great manor of Berkeley and the subsidiary manors of Slimbridge, Hinton, and Ham were in the possession of the King for the time being, having in default of issue male of William de Berkeley, who died in 1491, been limited to King Henry VII. for an estate to him and his heirs male. This estate determined on the death of Edward VI., and on September 3, 1555, Henry de Berkeley, the right heir of the settlor, though still a minor, was let into possession under a writ of special livery from Philip and Mary. I mention this because what happened while the Crown was in possession as lord of the various manors must be evidence of peculiar cogency.

On examining the records of the manors of Slimbridge, Hinton, and Ham, there appears to be considerable evidence of the existence, as appurtenant to each of these manors, of a several fishery in the river Severn, or some part thereof. I will deal with each manor separately. In the case of Slimbridge the reeve thereof accounts in 1449 for the rent of the fishery in the river Severn, in the lordship of Slimbridge, demised to John Knight by court roll. Here the fishery is treated as being within the manor, and is probably the same fishery as that elsewhere described as the fishery called Knight's Rock, in the Severn, in the manor of Slimbridge. In the minister's accounts for 1509 the bailiff of the hundred of Berkeley accounts for the rent of the fishery in the Severn in the manor of Slimbridge. This fishery is referred to as late in the hands of Knight, but now void in the hands of the lord

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

for default in repairs. At the halmote of the King as lord of the manor held on July 30, 1528, the homage presented that one Wyllys had entered on the possession of the King of one kedell or fishery in the Severn, in the lordship of Slimbridge, called "Knight's Roke," and had taken the profits to the disinheritance of the King. And, again, at the halmote held at Slimbridge on April 6, 1561, the homage were ordered to view this fishery. In 1584 there is a survey of the manor of Slimbridge in which one William Frape appears as lessee of one fishery in the Severn. The references to a kedell or fishery called Knight's Rock, and to a lease thereof having been avoided for want of repair, point not only to there having existed a fishery appurtenant to the manor of Slimbridge, but to the foreshore or river bed over which the fishery existed being vested in the owner of the fishery, for a kedell is undoubtedly a fixed engine. With regard to the manor of Hinton the evidence is of a similar nature, but very much stronger. As early as 1286 we find the reeve of Hinton answering for the profits of the fishery as part of the issues of the manor. As early as 1299 we find the lord of the manor granting a pool in the Severn with the right of placing "puches" or other instruments there. A puch, like a kedell, is a fixed engine. Again, in 1378 the reeve of Hinton accounts for the rent of various "borachs," which are also fixed engines used in fishing. In 1415 he accounts for various rents of fishings in the Severn demised to various tenants at a Court held in 1410. There is a rent roll of the manor in the year 1426, in which numerous tenants are entered as holding fishings from the lord in the Severn. One of them is said to hold three "borachs" of fishery. At a halmote of the King as lord of the manor held on April 25, 1526, William Legge took from the lord one weir or kedell, with its appurtenances, in the Severn called Holohasyll. At a like halmote on May 11, 1546, the homage presented the marriage without the lord's licence of one Margaret Bailey, who held of the lord a kedell in the Severn. At a like halmote in the first year of Queen Mary the homage present the death of a tenant of two fisheries in the Severn called the "Marshe" and the "Torn Rocke" respectively. At a Court Baron in 1593 John Harvey is admitted in right of his wife to

two kedells or fisheries in the Severn opposite Hollowe Hasyll, and to another kedell or fishery called "Depestage," opposite the "Haven Mowthe." There is also a rent roll of the manor of Hinton for 1604, in which numerous persons are entered as holding fishings in the Severn. At a halmote for Hinton held on May 2, 1610, a tenant surrenders two fisheries on the rock called Blackstone for the purpose of a re-grant. At another halmote held on March 27, 1611, there is a presentment of the death of the tenant of a fishery called Cheselhanger Rock. The evidence in the case of the manor of Ham is no less strong. In 1307 the reeve of the manor answers for the farm of the fishery at La Blakeston. In 1316 there is an entry in the account rolls of this manor of a sum paid for repairing the lord's fishery in the Severn. In 1348 the reeve again answers for the rent of a borach in the Severn at La Blakeston and for the rent for several other borachs, including one at Turnstone, at Le Megne Channel, said to be newly erected. This is an important entry, as it points to the erection of a fixed engine in the river bed as well as on the foreshore. In 1354 and 1375 the reeve again answers for similar rents—borachs being expressly mentioned in each case. In 1409 there is a rent roll of the manor in which numerous tenants are mentioned as holding stages, which I take to mean fishing stages or weirs in the Severn. Stages at Blackston are expressly mentioned. There is a similar rent roll in 1421 referring to numerous stages, including that called Blackston. In the minister's account of 1508 there are entries of rents for various fisheries in Ham, including Blackston, most of them being referred to as held by court roll. There is a reference to a fishery of twenty borachs. At a halmote held in 1515 Thomas Senagur takes from the King a fishery in the Severn called Turnrocke. There is a survey in 1544 in which twelve jurors, sworn before the King's Commissioners, present, inter alia, that divers persons hold as tenants various fishings or fishing places in the Severn in Ham Manor. These include Blackston. In 1547, 1 Edward VI., there is a presentment at a halmote for Ham of the death of a tenant holding a fishery in the Severn called "a rock," and the next year a similar presentment of the death of a tenant who held of the lord the

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

King, according to the custom of the manor, a fishery in the Severn called Haywards Rock. At the same halmote King Edward, as lord of the manor, grants the reversion of a fishery in the Severn, called "Le Shard," upon the rock called Blackston. In 1554 there is a survey, from which again it appears that there are tenants of fisheries in the Severn held of the manor of Ham, the fisheries being referred to as rocks or stages upon rocks. In 1558, at a halmote at Ham, a tenant takes from the lord three rocks or fisheries in the Severn on Blackston, and the same year there is a presentment of the death of another tenant holding three other rocks or fisheries in the Severn. In 1559 a tenant takes of the lord a fishery in the Severn called "Conygar Rock." In 1561 we find a tenant being admitted to a fishery called "Le Weston." In 1562 there is a lease of the reversion of the kedell or fishery called Blackston, this kedell or fishery being again referred to at a halmote held in 1593. A manor rent roll of 1601 refers to the manor fisheries of Conygar Rock, Blackston Rock, Deep Stage at Haven's Mouth, Haywards Rock, and other places. In 1602 at a halmote for Ham there is a presentment of the death of a tenant of Le Shard fishery on the rock called Blackston, and there are numerous similar records.

The significance of the manorial records hitherto mentioned lies in the fact that in all three manors the lord purports to grant fisheries in the Severn consisting of or involving the right to erect fixed engines on the foreshore, and in one case at least in the bed of the river. These grants are only consistent with the foreshore and bed of the Severn or some part thereof being vested in the lord, otherwise they would be usurpations on the rights of the Crown. And again, unless the lord had something in the nature of a several fishery in the Severn, appurtenant to each of the manors in question, the erection of fixed engines would be an infringement of the public right of fishing. It is to be observed also that the rocks or fisheries are often referred to as within the manors.

In the year 1607 Henry de Berkeley, the then owner of the manor of Berkeley and the subsidiary manors, having for some time past had difficulties in connection with his fishing rights in

the Severn, filed in Chancery a bill of complaint against one Dunning and others, alleging that he was seised in fee of the manor of Berkeley and that he and his ancestors used to have several fishings within the Severn from the bank of the river adjoining the said manor to the mid channel of the river, at and from Sheppardines Passage, near the manor of Hill, along up the Severn, in and through the deepest part of the channel unto the utmost part of the manor of Slimbridge to a point called Frampton Pill, as parcel of the lordship of Berkeley, and that he had been interrupted in the use of such fisheries; and the matter was referred to two Masters, who reported on February 13, 1608, upon the answers of the witnesses as well as upon those of the defendants, who admitted the complainant's title, that they saw no reason why a decree should not be made to the complainant for the quiet enjoyment of his fishery in the Severn according to the contents of the bill. This report was confirmed by the Court in 1609, and appears to shew that the fishing rights in the Severn, whatever the nature of such rights, extended to the mid channel and not only to the low-water mark of ordinary tides, and that they extended along the whole river boundaries of the three manors in question.

I will now pass to the charter of James I. It appears that Henry Lord Berkeley died in or about November, 1613, being at the time of his death seised in fee of the manors in question in this action, and leaving a cousin, George Berkeley, his heir-at-law. George Berkeley was, however, then an infant, and his wardship fell to the King. The King's officers appear to have experienced some difficulty in ascertaining at all accurately what rights or franchises had been enjoyed by George Berkeley's predecessors, and therefore the King, with a view to defining such rights, made in favour of George Berkeley, who was still a minor, the grant contained in the letters patent dated July 25, 1616. These letters patent commence with a recital that the late Henry Lord Berkeley, an ancestor of George Berkeley, and George Berkeley had used and enjoyed in the castle of Berkeley and the lordship and manor of Berkeley and the hundred of Berkeley divers liberties, franchises, and privileges, as well by reason of the grants and charters of former Kings as by reason

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

of use, custom, or prescription, but doubts had arisen by reason of certain defects in the wording of former charters, by reason whereof the same liberties, franchises, and privileges might not be fully and peaceably enjoyed. The King then grants to George Berkeley, his heirs and assigns, the liberties, franchises, free customs, immunities, and quittances within, in, or upon all and singular the aforesaid castle, lordship, manor, and hundred which are thereinafter particularly specified. These include wreck of the sea, whales, sturgeon, and other royal fish, the free fishery and fishing (liberam piscariam et piscationem) in the water and river of Severn in and by the whole hundred and extent of the hundred of Berkeley, free warren in all demesne lands, and generally all liberties and franchises enjoyed within the said castle, lordship, or hundred by George Berkeley or any of his predecessors by reason of any royal charter made or confirmed, or by any other right, title, use, custom, or prescription. With regard to the terms, the free fishery and fishing in the water and river of Severn, I think that they denote a several fishery, and not a mere right or common of fishing. That the words can denote a several fishery is clear—see the cases quoted by Stuart Moore in his book on the Law of Fisheries at p. 46—though it also seems clear that a grant of a free fishery by a person already entitled to a several fishery may pass only a common of fishery: see Stuart Moore's Law of Fisheries, p. 51. It is difficult, however, to see what would be the use of a grant of a common of fishery in a river where the grantee, as one of the public, already had a common right to fish, and, though, of course, at the time of the letters patent the King could not grant a several fishery in a tidal river de novo, there is no reason why he should not confirm a several fishery already existing. That the grant confirmed a several fishery to which the grantee was already entitled appears from the proceedings I am about to mention.

The letters patent of James I. did not, as it was intended they should, enable George Berkeley to exercise the various liberties, privileges, and franchises therein referred to without question, for in the year 1635, 11 Charles I., proceedings in quo warranto were taken against him by the King's Attorney-General questioning his

right to various liberties, privileges, and franchises within the various manors, including the manors of Berkeley, Slimbridge, Hinton, and Ham. The rights questioned included free warren and several fishery "so that none but he might fish in the water of Severn from the ferry called Shepherdine as far as Frampton, and thence further up the river," and also the franchises of whales, sturgeon, and other royal fish, wreck, and anchorage. George Berkeley put in a plea claiming title to all the rights called in question, and the Attorney-General, after inspecting the charters and letters patent in the plea referred to, including the letters patent of James I., and also divers court rolls of the manor and hundred of Berkeley, confessed the plea, except as to some few privileges immaterial to be here mentioned, and it was thereupon adjudged that all and singular the liberties and privileges and franchises mentioned in the information and claimed in the plea, with the exception aforesaid, be allowed to George Berkeley. This judgment in quo warranto is a direct decision, in proceedings to which the Crown was a party, in favour of the title of the plaintiff's predecessors to the rights called in question by the information and claimed in the plea, and I think it may therefore be taken to be proved that within the manor or lordship of Berkeley, which includes the sub-manors of Slimbridge, Hinton, and Ham, the plaintiff's predecessor was then entitled to a several fishery in the Severn, to the royal fish, to wreck, and to anchorage. All these rights point to the ownership of the soil over or in which they exist having been also in the plaintiff's predecessors, the only point left open as regards the Crown being how far into the foreshore and bed of the river these rights extended. This point, however, appears to me to have been decided by certain further proceedings to which the Crown was party, and to which I must next refer.

It appears that in 1637 the Attorney-General filed an information of intrusion against George Lord Berkeley and his tenants of certain lands in Slimbridge which had formerly been part of the foreshore or bed of the river Severn, but had lately become dry by some alteration in the course of the river. The defendants, with some difficulty, obtained leave to plead the general issue, and the case came on for trial in due course. There are

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

two contemporary accounts of this trial, one by Lord Hale, who was himself present, in his treatise De Jure Maris, and the other by John Smith or Smyth, one of the defendants, who, besides being a tenant under Lord Berkeley of part of the land in question, was steward of Lord Berkeley's various manors and a lawyer. Lord Hale describes the trial thus (Stuart Moore, History and Law of the Foreshore, 3rd ed. 402): "Upon the prosecution of Sir Sackville Crow, there was an information against Mr. John Smith, farmer of the Lord Barclay, setting forth, that the river of Severn was an arm of the sea, flowing and reflowing with salt water, and was part of the ports of Gloucester and Bristol, and that the river had left about three hundred acres of land near Slimbridge, and therefore they belonged to the King by his prerogative. Upon not guilty pleaded, the tryall was at the Exchequer bar, by a very substantial jury of gentry and others of great value. Upon the evidence it did appear by unquestionable proof, that the Severn in the place in question was an arm of the sea, flowed and reflowed with salt water, was within and part of the ports of Bristol and Gloucester, and that within time of memory these were lands newly gained and inned from the Severn; and that the very channel of the river did within time of memory run in that very place where the land in question lies; and that the Severn had deserted it, and the channel did then run above a mile towards the west. On the other side, the defendant claiming under the title of the Lord Barclay alledged these matters, whereupon to ground his defence, viz., 1st. That the Barons of Barclay were from the time of Henry II. owners of the great manor of Barclay. 2nd. That the river of the Severn usque filum aquæ was time out of memory parcel of that manor. 3rd. That by the constant custom of that country, the filum aquæ of the river of Severn was the common boundary of the manors on either side of the river. When the state of the evidence was opened, it was insisted upon, that the river in question was an arm of the sea, a royal river, and a member of the King's port, and therefore lay not in prescription to be part of a manor. But the Court overruled that exception; and admitted, that even such a river, though it be the King's in point of interest prima

facie, yet it may be by prescription and usage time out of mind parcel of a manor. Thereupon the defendant went to his proofs, and insisted upon very many badges of property or ownership; as, namely, that the lords of the manors adjacent to this river, and particularly those of that manor, had all royal fish taken within the river opposite to their manor usque filum aquæ: that they had the sole right of salmon fishing: that they had all wrecks cast between high-water and low-water mark: that the lords of the manors adjacent had ancient rocks or fishing places, and weares, or such as were of that nature, within the very channel: that they had from time to time granted these fishing places, some by lease, some by copy of court roll of their several manors, by the names of rocks, weares, staches, boraches, putts; and that they were constantly enjoyed, and rent paid by those copyholders and leaseholders: that by common tradition and reputation, the manors on either side Severn were bounded one against another by the filum aquæ, and divers ancient depositions produced, wherein it was accordingly sworn by very many ancient witnesses: that the increases happening by the reliction of the river were constantly enjoyed by the lords adjacent. These and many other badges were opened, and were most effectually made good by most authentical evidences and witnesses. But before the defendant had gone through one half of his evidence, the Court and the King's Attorney-General Sir John Banks, and the rest of the King's Counsel, were so well satisfied with the defendant's title, that they moved the defendant to consent to withdraw a juror, which though he were very unwilling, yet at the earnest desire of the Court and the King's Counsel he did agree thereunto. So that matter rested in peace, and the lands being of the yearly value of 200*l.* and better, are enjoyed by the Lord Barclay and his farmers quietly and without the least pretence of question to this day. This I know; for I was thoroughly acquainted with this case, and attended at the bar at the tryall."

The account of John Smith will be found in vol. iii. of the Berkeley Manuscripts, edited by Sir John McClean for the Bristol and Gloucestershire Archæological Society. It is of much greater length than Lord Hale's account and is far more

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

entertaining, being full of those personal touches which one would expect from a writer so deeply interested in the result of the trial. Its chief importance, for the purposes of this case, is that it shews quite clearly that the lands to which the information related were in the manor of Slimbridge, and that the defendant's proofs were directed to shewing not only that the foreshore and bed of the river to the centre of the deep-water channel were parcel of the manor of Great Berkeley, but parcel also of the three subsidiary manors of Slimbridge, Hinton, and Ham, which are described as included in the great manor of Berkeley, and that a great deal of the evidence to which I have already referred, as, for example, the manorial records of the subsidiary manors, and the rent rolls and reeves' accounts, was produced at the trial. It was strongly pressed upon me by Mr. Fox-Davies that the result of these proceedings did not, as Lord Hale thought it did, turn upon proof that the boundary of the various manors was the centre of the deepest channel of the river, because the result would, by reason of the law relating to accretion, have been the same if the boundary of the manors had been the foreshore. Possibly the case might have been argued on the law relating to accretion, but evidently it was not so argued, and I think it would be extremely difficult, if not impossible, for the Crown, after what then happened, to contend that the boundary of the manors was not as stated by Lord Hale. In fact, the solicitor of the Board of Trade has written a letter to the plaintiff's solicitors in effect stating that the Crown is prepared to accept this case as deciding the boundary of the great manor of Berkeley to be the centre of the deep-water channel for the time being of the river, but suggesting doubts whether the manor of Slimbridge is in fact within the great manor of Berkeley. As, however, I have already mentioned, according to John Smith's account of the trial, the evidence adduced was directed to proving that the foreshore and bed of the river usque ad medium filum were not only parts of the great manor, but were parts also of the three manors of Slimbridge, Hinton, and Ham, which adjoin the river, and there is, therefore, no more reason for accepting the decision as defining the boundaries of the great manor than there is for accepting it as defining the boundaries

of these subsidiary manors. Further, all the earlier evidence which I have examined points to the foreshore and bed of the river usque ad medium filum being within the subsidiary manors and only within the great manor because it includes the subsidiary manors. It is, no doubt, obscure how Slimbridge came to form part of the great manor. It is not mentioned, at any rate, by the name "Slimbridge" as part of the great manor in Doomsday Book, but, as I have already pointed out, it is stated to be a member of the great manor as early as 1368, and all the subsequent evidence is consistent, and consistent only, with this view. Having arrived at the conclusion that in these proceedings it was established in the presence of the Crown that the boundary of the three manors in question was the centre of the deep-water channel for the time being of the river Severn, it becomes unnecessary to consider the subsequent evidence in any detail. I may say, however, that the evidence of the later seventeenth century and the eighteenth and nineteenth centuries, in my opinion, points unmistakably in the same direction. The manorial records continue to contain entries analogous to those I have already described at some length. There is a deed dated March 27, 1678, whereby there is released to the then Lord Berkeley a rock or fishery in the Severn known as the Long Stage, situate in the parish of Berkeley, and all sand, soil, and ooze extending in length, and breadth of the said rock, from the said rock unto the middle of the channel of the river Severn for the time being. Again, there is evidence of the plaintiff's predecessors having erected on the foreshore, and at times even in the channel, breakwaters, not only to prevent encroachment by the river, but to gain land from the river. This practice of erecting breakwaters can be traced from the middle of the eighteenth till the later part of the nineteenth century. Then there are the nineteenth century prosecutions under the statute in that behalf of persons unlawfully taking fish in a several fishery. It appears that for the purpose of these prosecutions, which were instituted by the owner for the time being of the manor of Great Berkeley, the several fishery was assigned as extending to the middle of the deep-water channel for the time being. One of the witnesses for the plaintiff was himself prosecuted for fishing in

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

the deep-water channel on the plaintiff's side thereof and was acquitted on the ground that the magistrates did not consider it clearly proved that he was actually on the plaintiff's side of such channel. Then, again, there are the several certificates of privileged fishing engines granted to the plaintiff's predecessors by the Commissioners under the Salmon Fishery Acts, 1861 and 1865—certificates which shew fixed fishing engines not only on the foreshore but also in the deep-water channel of the river. Once more, there are the various notices which the agent of the Berkeley estates has for many years been in the habit of either posting up on the banks of the river or of sending to trespassers, claiming a several fishery as far as the centre of the deep-water channel; and, finally, there is the contemporary evidence of reputation as to the manor boundaries. I think, therefore, it is clearly established that the lands on which the defendant is alleged to have trespassed were at the date of the acts complained of part of the three manors of Slimbridge, Hinton, and Ham, and therefore part also of the great manor of Berkeley; and as it is admitted that the plaintiff is, and at all material times was, entitled as tenant for life to all these manors and in actual possession thereof, it follows that he has proved sufficient to entitle him to maintain trespass.

In arriving at this conclusion I have not forgotten the point on which Mr. Fox-Davies laid considerable stress, namely, the evidence of the existence of a practice known as the custom of the Gale. It certainly appears from the ancient records that there was at one time a practice for any one who liked so to do to fish in certain pools in the Severn at certain conditions of the tide, provided that he either accounted to Lord Berkeley's lessee or agent for half the value of the fish taken, or handed over the fish taken to such lessee or agent in consideration of receiving half its value. Fortunately I have not to decide whether those persons who took advantage of the practice or custom of the Gale did so as of right or by sufferance only, or whether such custom or practice, if proved to have been enjoyed as a right, would be a valid or legal custom. It is sufficient to say that in my opinion there is nothing in the nature of such a custom, should it be proved and upheld as a valid and legal custom, which is

inconsistent with the plaintiff having a several fishery at all times and places during or in which the custom did not prevail—much less inconsistent with the conclusion at which I have arrived, that the soil of the foreshore and bed of the river to the middle of the deepest channel is vested in the plaintiff as lord of the manor of Great Berkeley or its subsidiary manors. I therefore do not think it necessary to consider the point further.

Having come to the conclusion that the plaintiff has proved all that is necessary to entitle him to bring an action of trespass, it becomes necessary to inquire whether the defendant can justify the acts complained of. The defendant tries to justify what he has done on the following grounds. First, he says that as a member of the public he has a common law right to enter upon the foreshore and bed of a tidal navigable river for the purpose of killing wild fowl, to kill wild fowl there, and convert what he kills to his own use. Secondly, he says that he and all other inhabitants of the manors of Slimbridge, Hinton, and Ham, and the manor of Arlingham, or alternatively of the great manor of Berkeley, have this right by virtue of a trust or condition in their favour created by the King in or upon the occasion of the grant by the King to the plaintiff's predecessors of the lands upon which the right is claimed. Thirdly, he claims this right in common with any of the inhabitants of the manors of Arlingham, Hinton, and Slimbridge, or alternatively of the great manor of Berkeley, being wild-fowlers by trade, by virtue of a local immemorial custom within these manors. Lastly, he claims the right by prescription, not as appurtenant to any tenement, but as a right in gross enjoyed by him and his ancestors. I propose to deal with these four claims of right in the reverse order.

First, then as to the claim of prescription for a right in gross alleged to have been enjoyed by the defendant and those whose heir he is. In my opinion the evidence adduced by the defendant at the trial is totally inadequate to support such a claim. For the last eight or nine years the defendant has lived, not in the immediate neighbourhood of the lands in question, but about twelve miles up the river. Before that, right back to the year 1876, he had been employed in various lines of business at such a distance from the lands in question that it was impossible for

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL

him to exercise his alleged right. It is true that on one or two occasions he may, as he says, have come back for a holiday and had a day's shooting, but there is no evidence that, if he did, he came down the river and shot wild fowl on the lands in question. For the three or three and a half years before 1876 he was employed in connection with the Severn bridge and lived in close proximity to the lands in question. During that period he attempted to exercise his alleged right, but was stopped by Lord Fitzhardinge. Before that he had lived with his father at or near the house he now occupies. He is fifty years old, having been born in December, 1857. He was, therefore, between fifteen and sixteen when he went to work on the Severn bridge. Before going to the Severn bridge he can only have been shooting for three or four years, having, he says, been presented with his first gun on his twelfth birthday. He says his father was a fisherman and wild-fowler living at or near where he now lives and used to take shooting parties to many spots on the river. Indeed it was quite clear that neither the defendant nor his father ever limited their claim to a claim to shoot on the lands in question, but asserted their right to shoot at all points, up and down the river, as far, at any rate, as the flow of the tide; and, further, that the right they asserted was not asserted as a right vested in them only, but vested in them in common with many others, if not in common with all others. The defendant's father appears to have had a kind of partnership with Walter Long. Both of them shot on the river generally, but there is no very satisfactory evidence whether or how often they shot on the particular lands in question. Walter Long, like the defendant and his father, lived twelve miles up the river from the nearest point of the lands in question, as also did Jacob Valendar, who says he shot several times with the defendant's father all down the channel, but only in the channel, on both sides. The defendant's grandfather had guns and used to shoot, but there is no satisfactory evidence whether or how often he shot on the lands in question. Under these circumstances, it seems to me quite impossible to hold that there is sufficient evidence to justify the conclusion that the defendant or his ancestors, whose heir he is, have acquired any prescriptive right at all.

Secondly, with regard to the alleged custom for the inhabitants of the manors of Arlingham, Hinton, and Slimbridge, or alternatively of the great manor of Berkeley, being wild-fowlers, to shoot wild fowl on the lands in question. It is, in my opinion, more than doubtful whether such a custom is good in law. No right to a profit can be claimed by custom, and on the authority of *Davies' Case* (1) and *Wickham* v. *Hawker* (2) it appears to me that I am bound to hold that the right claimed is a profit and not a mere easement. Mr. Fox-Davies suggested that if the right claimed did not extend to birds of warren it was not a profit, but an easement. I do not think that any such distinction can be drawn. Lindley L.J., in *Duke of Sutherland* v. *Heathcote* (3), defines a profit as a right to take something off another person's land. It may be, having regard to the case of *Race* v. *Ward* (4), that the something taken must be such that it would otherwise belong to the owner of the soil; but it appears from the case of *Rigg* v. *Earl of Lonsdale* (5) that if a man shoots grouse on his neighbour's land, trover will lie for the birds killed, though grouse had long before been decided not to be birds of warren—see *Duke of Devonshire* v. *Lodge* (6)—and certainly a right to fish in another man's stream is a profit. Further, I am not at all satisfied that a wild duck is not a bird of warren. Sir Edward Coke refers to mallards as birds of warren—1 Inst. 233 a;—and though Manwood, 4th ed. 1717, p. 362, refers only to the pheasant and the partridge, I do not think that it was decided in *Duke of Devonshire* v. *Lodge* (6) that birds of warren were confined to the pheasant and the partridge, but merely that a grouse was not a bird of warren. Manwood, in the same passage, seems to consider that birds of warren are such as are taken by long-winged hawks. (7) Certainly herons were in ancient times taken by long-winged hawks, and Manwood does

(1) 3 Mod. 246.
(2) 7 M. & W. 63.
(3) [1892] 1 Ch. 484.
(4) (1855) 4 E. & B. 702.
(5) 1 H. & N. 923.
(6) 7 B. & C. 36.
(7) "In the register in the writ of trespass for hunting in a warren, 'tis averred that the trespass was done there in taking or driving away those beasts or fowls which are beasts or fowls of warren, which, as Budæus tells us, are such which may be taken by long-wing'd hawks; and those are the hare, the coney, the pheasant, and the partridge."

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

not mention them as birds of warren, though Sir Edward Coke does. I find on reference to Mr. Turner's introduction to the Selden Society's volume "Select Pleas of the Forest," pp. cxxix., cxxxi., that there is authority for including quails, plover, or even larks as birds of warren. The poet Michael Drayton, who lived in the early part of the seventeenth century, before falconry had fallen into disuse, gives in the twentieth song of his Polyolbion, Drayton's Works, ed. 1753, vol. iii. p. 1044, a graphic description of what was apparently known in the language of falconry as "the flight at the brook." In this description wild duck is not specifically mentioned as the quarry, but it is quite certain that the quarry described is some species of water-fowl, and that the hawks which took them were long-winged and not short-winged hawks. In another passage Drayton refers to duck and mallard as the common quarry of falconers. The last-mentioned passage is quoted in Madden's Diary of Master William Silence (1st ed. p. 170, 2nd ed. p. 163), the author of which, himself an expert in the various sports of the sixteenth century, on p. 208, 1st ed. 209, again refers to the taking of mallards with long-winged hawks. In my opinion, therefore, Sir Edward Coke was right, and wild duck are birds of warren. But whether or not the custom alleged be good in law, I am of opinion that the evidence in the present case is far short of what is required to prove any custom at all. The only evidence of any exercise of the alleged right by persons being wild-fowlers by trade is the evidence of an exercise of the right by the defendant and his father, by Walter Long, and by Jacob Valendar. It is not proved that any of these, with the exception of the defendant and his father, for some short period, lived in any part of the local area in which the alleged custom is said to prevail. It is proved that in exercising the alleged right none of them confined himself to shooting on the lands in question. They claimed to exercise the alleged right up and down the river, at any rate as far as the flow of the tide. Further, others not being wild-fowlers by trade also exercised the alleged right. The user proved, therefore, is more extensive than the custom alleged, and would only be partially explained by the custom if upheld. I am of opinion, under these circumstances, that the

defendant cannot rely on the alleged custom as a justification of the acts complained of.

Thirdly, as to the right claimed in common with all the inhabitants of the manors of Slimbridge, Hinton, Ham, and Arlingham, or alternatively of the great manor of Berkeley, by virtue of a trust or condition in their favour created by the original grants or grant of the lands over which the right is claimed. It was sought to establish this right on the principle laid down in *Goodman* v. *Saltash Corporation*. (1) Whether or not the principle so laid down would be extended to a case like the present is, I think, exceedingly doubtful, but I am quite satisfied that the evidence in the present case would not justify me in drawing any inference or making any presumption as to the creation of any such trust or condition. Even if all the persons proved to have exercised the alleged right were also proved to have been inhabitants of the manors in question, the user proved would have been, in my opinion, insufficient to justify me in drawing the inference or making the presumption. But as a matter of fact most of these persons are either not proved to have been inhabitants of the manors in question, or are proved not to have been such inhabitants, so that the inference or presumption I am asked to draw or make would not explain in any way whatever what has actually occurred. The defendant cannot, therefore, justify what he has done on any such trust or condition as suggested.

Lastly, with regard to the alleged common law right for all the King's subjects to shoot wild fowl at their will and pleasure on the foreshore and in the bed of tidal navigable rivers, I have failed to find any suggestion of the existence of such a right in any of the authorities which were cited to me in argument, or which I have myself consulted on the point. So far as the actual foreshore is concerned—that is, the land between high and low water mark of ordinary tides—I am, I think, bound to hold that at any rate when the foreshore is uncovered by the tide any rights the public have are ancillary to the public rights of fishing and navigation in the sea itself: see *Blundell* v.

(1) 7 App. Cas. 633.

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL

Catterall (1); *Brinckman* v. *Matley*. (2) A distinction, however, was sought to be drawn between the foreshore when not covered with water on the one hand and the foreshore when covered with water and the bed of the river on the other hand. It was said that the bed of the river and the foreshore when covered with water are in fact parts of the sea, all rights which the public have on the sea attaching to the foreshore as the tide comes in and covers it. This is, I think, a correct statement of the law, but it does not follow that in the sea below the ebb and flow of the tide the public have rights other than rights of fishing and navigation and rights ancillary thereto. Indeed, in *Blundell* v. *Catterall* (1), the reason why Holroyd J. comes to the conclusion that the rights of the public in the foreshore when uncovered by water are confined to rights in connection with fishing and navigation is precisely because the rights of fishing and navigation and rights ancillary thereto are the only public rights known to the common law in the sea itself. "The public common law rights," he says, "with respect to the sea, &c. independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea shore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes." I am inclined to think that in the face of this judgment I should be bound to hold that the public have no rights in the sea itself, except rights of fishing and navigation and rights ancillary thereto, even were I of opinion that further public rights might but for that judgment have been established, but I am not of that opinion. The effect of the two cases I have cited is that, subject to the public rights in connection with fishing and navigation, the Crown's ownership of the foreshore is a beneficial ownership. Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial

(1) 5 B. & Al. 268, 301. (2) [1904] 2 Ch. 313.

ownership. The bed of the sea, so far as it is vested in the Crown, and a fortiori the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of "incrementa maris" seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted. This beneficial ownership of the Crown, or the Crown's grantee, can only, I think, be considered to be limited by well-known and clearly defined rights on the part of the public. I can find no suggestion in the authorities of any such public right of wild-fowling as suggested, either on the sea itself or in the channels of public navigable rivers. Had such a right existed, I should have expected to find it mentioned or referred to in the authorities, though its importance before the introduction of sporting guns would not have been very great. At any rate it appears to me that, when, as in this case, the foreshore and bed of a tidal navigable river have from time immemorial been vested in a subject, I should not be justified in holding that any such right existed. It was argued on the defendant's behalf that he had a right to be in his boat on any part of the deep channel of the Severn or on the foreshore when covered by water, and that, being there, he could not be prevented from killing wild birds, in which there is no property known to the law. But the right of navigation by

PARKER J. 1908 FITZ-HARDINGE (LORD) v. PURCELL.

virtue of which he justifies his boating over the channel and foreshore when covered by water is, I think, analogous to a right of way or passage, and can only be used for those purposes for which it exists: see *Harrison* v. *Duke of Rutland* (1); *Hickman* v. *Maisey*. (2) Further, I am not satisfied that the common law recognizes no proprietary right at all in wild birds. As I have already pointed out, it does recognize a property in them as soon as they are killed, for trover will lie for grouse killed on a man's land by a stranger; and if for grouse, which is not a bird of warren, why not for a wild duck or mallard? If wild fowl be flushed on one man's land and driven into another man's land and killed there, different considerations will arise, and the question whether the wild fowl are birds of warren may be material. In this case the owner of the land where they were flushed might possibly be entitled virtute privilegii, because they were birds of warren, though he could not claim to be entitled virtute soli, because they were not killed on his land. However this may be, it seems to me reasonably clear that, unless the defendant in this case can establish a substantive common law right to shoot wild fowl on the lands in question, he cannot justify what he has done on the ground that he has a right of navigation any more than a person with a right to pass along a highway could, under the shadow of such right, justify a claim to shoot wild fowl as he passed along. What was said by Holroyd J. in *Blundell* v. *Catterall* (3) with regard to the alleged right of bathing on the foreshore may, I think, be said with equal truth of the alleged right to kill wild fowl in the channel of navigable rivers—"Where the soil remains the King's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the King, the parens patriæ"—and I think what is thus said of the King may with equal truth be said of those subjects of the King to whom beds of navigable rivers have been granted. At any rate I am satisfied in the present case that the defendant's sport would never have been

(1) [1893] 1 Q. B. 142. (2) [1900] 1 Q. B. 752.
(3) 5 B. & Al. 300.

interfered with had he not persistently asserted a right to shoot wild fowl, and that, too, in the immediate neighbourhood of the plaintiff's decoys. Having given the best consideration I can to the various points made by Mr. Fox-Davies in his able argument, I am unable to find that the defendant has in any way justified the acts of which the plaintiff complains.

Solicitors: *Boodle, Hatfield & Co.; W. P. W. Phillimore.*

J. R. B.

WEYMOUTH *v.* DAVIS.

[1908 W. 612.]

Land Transfer — Registered Title — Mortgage by Deed — Contemporaneous Instrument of Charge—Order foreclosing Mortgage, but not Charge—Rectification of Register—Form of Order—Land Transfer Act, 1875 (38 *& 39 Vict. c.* 87), *s.* 95.

Form of order under s. 95 of the Land Transfer Act, 1875, rectifying the register in a case where a foreclosure order had foreclosed a mortgage by deed of registered land without foreclosing the contemporaneous instrument of charge.

ORIGINATING SUMMONS.

On March 12, 1902, the defendant mortgaged a leasehold house at Hampstead by sub-demise to the plaintiffs to secure 1100*l.*

On the same day the defendant, who was registered with a possessory title at the Land Registry, executed an instrument of charge in favour of the plaintiffs for the same amount and on the same property.

The plaintiffs did not register this charge, but registered a notice of deposit of the land certificate. This course was adopted with the view of saving expense.

In September, 1906, the plaintiffs commenced a foreclosure action, *Weymouth* v. *Davis* (1906 W. 2761), before Neville J. to foreclose the mortgage by deed.

On August 27, 1907, an order of foreclosure absolute was made, ordering that the defendant Abraham Davis do from

SWINFEN EADY J.

1908

WEYMOUTH v. DAVIS.

henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said mortgaged hereditaments and premises or any part thereof, and ordering that the plaintiffs do forthwith recover possession of the said mortgaged hereditaments and premises, particulars whereof were set forth in the schedule thereto.

These proceedings merely foreclosed the mortgage by deed, and contained no reference to the instrument of charge.

On September 10, 1907, the plaintiffs applied to register the foreclosure order at the Land Registry, but the application was refused as the order was obtained on an unregistered mortgage deed.

On October 4, 1907, the instrument of charge was registered, and on October 18, 1907, a further application to register the foreclosure order was made. This application was refused, on the ground that the foreclosure order only foreclosed the unregistered mortgage and did not affect the registered charge.

On October 25, 1907, a caution was registered at the suggestion of the registrar.

On November 6, 1907, the plaintiffs instructed their present solicitors, who had not acted for them previously in the matter.

On February 28, 1908, the plaintiffs issued this summons before Neville J. (by certificate) for a declaration that the foreclosure order might be read and construed as if the defendant were thereby debarred and foreclosed of any equity of redemption under the charge as well as under the mortgage, and for an order that the registrar of the Land Registry might be directed, pursuant to s. 95 of the Land Transfer Act, 1875, to make the necessary entries accordingly.

The defendant did not enter an appearance.

Owen Thompson, for the plaintiffs. The application is for rectification under s. 95, which provides that "subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such Court is of opinion that a rectification of the

register is required, such Court may make an order directing the register to be rectified in such manner as it thinks just."

Now, the order of foreclosure absolute is a decision that the plaintiffs are entitled to the land free from any equity of redemption under the mortgage. The instrument of charge is merely ancillary to the mortgage by deed, and is to secure the same amount on the same property in favour of the same plaintiffs. The Court has jurisdiction to put the matter right under s. 95 : *Capital and Counties Bank, Ld.* v. *Rhodes.* (1)

SWINFEN EADY J. I am prepared to make an order as follows:—" It appearing that the registered charge of March 12, 1902, in the originating summons mentioned was to secure the same amount as the unregistered mortgage of March 12, 1902, in the said summons also mentioned; And this Court being of opinion that as a consequence of the foreclosure absolute the mortgagor no longer has any interest in the land comprised in the charge, and that a rectification of the register is required, This Court doth order that the registrar of the Land Registry, pursuant to s. 95 of the Land Transfer Act, 1875, do rectify the register in the same manner as if the charge had expressly and in terms been comprised in the foreclosure action of *Weymouth* v. *Davis* (1906 W. 2761)."

The draft order had better be shewn to the registrar of the Land Registry before it is drawn up.

May 21. *Owen Thompson* stated that the registrar of the Land Registry would prefer the order to go in the following form :—

"It appearing that the registered charge of March 12, 1902, in the originating summons mentioned was to secure the same amount as the unregistered mortgage of March 12, 1902, in the said summons also mentioned; And this Court being of opinion that as a consequence of the foreclosure absolute the mortgagor no longer has any interest in the land comprised in the charge and that a rectification of the register is required, This Court doth order that the defendant Abraham Davis do from henceforth

(1) [1903] 1 Ch. 631, 657.

SWINFEN EADY J.
1908
WEYMOUTH v. DAVIS.

stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the hereditaments comprised in and charged by the said registered charge.

"And it is ordered that the registrar of the Land Registry, pursuant to s. 95 of the Land Transfer Act, 1875, do rectify the register by cancelling the said charge on the register, and by cancelling in the proprietorship register the name of the defendant and substituting therefor the names of the plaintiffs."

SWINFEN EADY J. The order may go in that form. It may be useful as a precedent in other cases.

Solicitors: *Neave, Bretherton & Morton.*

G. R. A.

C. A.
1908
March 11;
April 17;
May 27.

POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

[1906 P. 2573.]

Telegraph — Telephone — Postmaster-General — Monopoly — Private Lines — Electric Bell Signals—Telegraph Act, 1869 (32 & 33 *Vict c.* 73), *s.* 5.

Private telegraph or telephone lines connecting two or more separate and independent persons or businesses, and non-telephonic fire alarms and other electric signals, fall within s. 5 of the Telegraph Act, 1869, and are therefore excepted from the monopoly of the Postmaster-General.

Decision of Swinfen Eady J., [1907] 1 Ch. 621, reversed.

APPEAL from the decision of Swinfen Eady J. (1)

The only question argued on this appeal which calls for any notice in this report was whether certain classes of private telegraph and telephone lines supplied and maintained by the defendant company were within the monopoly of the Postmaster-General or were excepted therefrom by s. 5 of the Telegraph Act, 1869.

A further question was, as a fact, raised whether the defendant company were not estopped by the terms of their licence of November 29, 1884, from now denying that certain lines, which

(1) [1907] 1 Ch. 621.

might otherwise have been within the exception, were liable to royalties under the licence, but as this question turned entirely upon the construction of the particular words of clauses 2 and 7 of the licence, the facts, arguments, and judgments on this part of the case are omitted.

The Telegraph Act, 1869, after a preamble reciting (inter alia) that, in order to protect the public revenue, it is expedient that similar powers to those conferred upon the Postmaster-General with respect to the exclusive privilege of conveying letters should be enacted with reference to the transmission of "public telegraphic messages" within the United Kingdom, enacts as follows:—

Sect. 4. "The Postmaster-General, by himself or by his deputies, and his and their respective servants and agents, shall . . . . have the exclusive privilege of transmitting telegrams within the United Kingdom . . . . except as hereinafter provided; and shall also within that kingdom have the exclusive privilege of performing all the incidental services of receiving, collecting, or delivering telegrams, except as hereinafter provided."

Sect. 5. "There shall be excepted from the said exclusive privileges of the Postmaster-General all telegrams of the following description; (that is to say,)

1. "Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof:

2. "Telegrams transmitted by a telegraph maintained for the private use of a corporation, company, or person, and in respect of which, or of the collection, receipt, and transmission or delivery of which no money or valuable consideration shall be or promised to be made or given: . . . .

5. "Telegrams the transmission of which is authorized by the provisions of the Telegraph Act, 1868, or any agreement confirmed thereby, or made or to be made in pursuance thereof." (1)

(1) Sect. 9, sub-s. 8, of the Telegraph Act, 1868, authorizes railway companies to make "arrangements with coalmasters, ironmasters, and

C. A. 1908

POSTMASTER GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

The defendants were the licensees of the Postmaster-General in respect of telephones, i.e., instruments for the purpose of transmitting or receiving spoken messages or communications by means of electricity, which are telegraphs within the Act: *Attorney-General* v. *Edison Telephone Co. of London.* (1)

The licence, dated November 29, 1884, was granted in consideration (clause 7) of a royalty on the defendants' gross receipts for the use of the telephones. Besides the usual exchange lines, the defendants also supplied and maintained private lines connecting two places direct and worked without the defendants' intervention by the parties at the terminals, one of whom paid an annual rental. They were of two classes, namely, A to A lines, with the terminals on property belonging to the same person, such as a line from a merchant's office to his private house or wharf or to his partner, or a line connecting a head and branch office, or any line connecting an employer and his servants.

It was admitted that these were outside the Postmaster-General's monopoly.

The other class consisted of A to B lines, with the terminals on property belonging to different persons, and of these eighteen examples, with details, were given in the first schedule to the special case. The following were those referred to in the arguments or judgments:—

2. A fire alarm system, consisting of special boxes placed in the street by a municipal corporation, and telephonic apparatus supplied by the defendants and placed therein. Keys are supplied to the police and also to householders, in some cases free of charge, and in others on payment of a yearly fee or rental. Any person having a key can open the box and can by means of the telephonic apparatus therein signal to the police station, fire station, or ambulance, and also telephone to the police station. Agreement executed and rental paid by the corporation.

---

traders generally upon the company's system for the erection and working of private telegraphs between coalpits, ironworks, factories, warehouses and offices in connexion with the stations of the company, or over their line" for private business, and with no money payments.

(1) (1880) 6 Q. B. D. 244.

3. From a doctor's residence to a chemist's shop, where the chemist not only makes appointments for patients to see the doctor, but also prepares drugs by the direction of the doctor and supplies them either to the doctor or direct to the doctor's patient. Agreement signed and rental paid by the doctor.

4. Between the offices of two companies, the Cannon Brewery Company, Limited, and the Mile End Distillery Company, Limited, where the same person is managing director of each. Agreement signed and rental paid by the Cannon Brewery Company, Limited.

5. From theatrical ticket agents or dealers, Keith, Prowse & Co., Limited, to sixteen hotels, thirty-two theatres, and two large stores. Agreement executed and rental paid by the ticket agents.

6. From the chief office of an estate company to a contractor (plumber or builder). Agreement executed and rental paid by the estate company.

7. From a firm of printers to a bank. Agreement signed and rental paid by the printers.

8. From a company to a firm of solicitors. Agreement signed and rental paid by the company.

10. From a steamship company to excursion and tourist agents. Agreement signed and rental paid by the steamship company.

The Postmaster-General considered that these A to B lines fell within his monopoly, so that royalties were payable thereon under the licence.

The defendants also supplied and maintained electric signals which, being non-telephonic, were not within the licence. Two examples of these were given in the second schedule, viz.:—

1. A fire alarm system, consisting of special boxes placed in the street by a municipal corporation, and signalling apparatus supplied by the defendants and placed therein. No telephones are employed. Any member of the public, by breaking the glass front of and pulling a lever in the box, thus making an electrical contact, can cause a signal to be displayed at the police station, fire office, or ambulance, and an electric bell or equivalent to operate. Agreements executed and rental paid by corporation.

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

2. From the premises of golf club to a tramway terminus. No telephone is used; a bell on the premises of the golf club is actuated by a push button fitted in a box attached to a tramway pole situated on the highway. The apparatus is operated by the tramway officials pressing the button, thus making an electrical contact and ringing the bell on the golf club premises so as to give signal of the starting of the trams. Agreement signed and rental paid by golf club.

A special case was submitted to determine, first, whether the defendants were accountable for royalties on the A to B lines as being within the Postmaster-General's monopoly; and, secondly, whether the unlicensed electric signals of the character set forth in the second schedule were a contravention of that monopoly.

It appeared that from the end of March, 1897, the defendant company had refused to pay and had never since paid royalties in respect of the A to B lines, and by agreement between counsel the special case was treated as amended by a statement to this effect.

Swinfen Eady J. answered both questions in the affirmative. The company appealed.

Sir R. Finlay, K.C., *Danckwerts, K.C.*, and *H. H. Gaine*, for the appellants. It is admitted by the Crown that A to A lines with the terminals on property belonging to the same persons are outside the Postmaster-General's monopoly. But the exceptions to s. 5 of the Telegraph Act, 1869, are not confined to communications between different portions of the same establishment. If they are restricted to cases where the owner is sending messages to himself through his servants, the exception of telegrams for which no charge is made is unnecessary and absurd. That provision shews that it was contemplated that the telegraph might be used by independent persons. The condition that the line must be "solely for private use" is fulfilled if the line is not open to the public. No one can use the A to B lines except the persons for whom they were put up and other people with their permission. If the respondents are right, an ordinary electric door bell would be within the Postmaster-General's monopoly.

[MOULTON L.J. Can a line which is entirely in one house be, strictly speaking, a telegraph ?]

There is no authority on that point, but door bells were intended to be covered by the exceptions. Every wire is excepted which is put up for the purpose of communicating with a particular person about his business or private affairs, without reference to the question who is using the line at the other end. The learned judge in the Court below thought that this point was covered by *Attorney-General* v. *Edison Telephone Co. of London* (1), but that case only decided that a telephone was a telegraph within the Telegraph Acts. The explanation of these exceptions given in the judgment (2) is in our favour, and we agree that there must be only one owner of the line. The circumstance that in the examples given in the schedules to this special case rent is paid to the company is immaterial. The person who pays the rent is the owner for the purposes of the exceptions, and he would have been entitled to put up the wire himself. [They referred to the details of Nos. 2 to 8 and 10.] The examples in the second schedule are of the same nature as an electric door bell. They are only signals and do not interfere with the monopoly. In both cases the apparatus can only be used for the private business of the person who pays the rent, and no charge is made by the owner. All that the company do is to put up the line and maintain the contact with the person at the other end. No one can use the line except the person for whom it was put up, or with his assistance and permission. In considering exceptions to s. 5 of the Act of 1869 it must be borne in mind that there are two ends to a telegraph wire. The provision that no charge shall be made refers to payment by or to the owner of the line, not by or to the person at the other end of it. There must be no charge for transmission, but so long as the owner makes no charge an independent person who uses the other end of the line is within the exceptions. That this is so is shewn by s. 9, sub-s. 8, of the Telegraph Act, 1868, which allows railway companies, without payment to the Postmaster-General, to erect and work private telegraphs between their stations and coalpits, factories, and offices. We admit that the

(1) 6 Q. B. D. 244. (2) 6 Q. B. D. 260, 261, 262.

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

owner must not put two independent persons into communication with each other.

Sir W. S. Robson, A.-G., Sir S. T. Evans, S.-G., and *Casserley*, for the Postmaster-General. By the Telegraph Act of 1868 the Postmaster-General was empowered to acquire telegraphs, and under that Act he took over a large system of telegraphs. Nothing was said at that time about a monopoly. Then the Telegraph Act, 1869, was passed, which gave the monopoly, subject to exceptions in the case of private lines similar to the provisions of s. 2 of the Post Office (Management) Act, 1837. The first two exceptions to s. 5 of the Telegraph Act, 1869, are somewhat difficult to construe, but their object is the same. The first exception deals with the interest of a man who owns a telegraph line for purposes of convenience, not of profit; it treats him as one person; and the same idea prevails in the second exception. They refer to the interests of one person, not to a line maintained for the benefit of several persons, and are intended to cover A to A telegrams sent by a man to himself from his house to his works or his office, not telegrams by him to another. If the owner is allowed to enter into communication with other persons the line ceases to be for his private business within the exceptions. The reason why no charge is to be made is that the owner of the line might lend it to some one else, and that would not be for his own private use. In the A to B instances now before the Court the defendant company receive rent for the use of the wires, and the payers of rent are able to put any number of persons into communication with each other and charge them a rent and thus interfere with our monopoly. No doubt, in a sense, every communication between two persons is on private business, but in these exceptions the business of the owner alone is intended, and two or more businesses are interested in the A to B examples in the first schedule. By s. 9, sub-s. 8, of the Telegraph Act, 1868, railway companies are allowed to maintain certain wires to communicate with other persons, and that shews that a special exception is necessary. The electric signals in the second schedule are telegraphs, and the same considerations apply. *Attorney-General* v. *Edison Telephone Co.*

of London (1) shews what is meant by the word "private" and is in our favour. The object of the Telegraph Act, 1869, was to create a monopoly in the Postmaster-General, and the Act will not be construed in such a way as to defeat that object by sanctioning competition. It was never intended that a company like the appellants should do the work and charge a rent for maintaining it. Maintenance as well as ownership is covered by the exceptions, and under the second exception the owner must pay for maintaining the line. It must be his line, not that of the defendant company.

Sir R. Finlay, K.C., in reply. Since March, 1897, the defendant company have consistently refused to pay royalties in respect of these A to B lines, and the whole question has always been treated as turning on the interpretation of s. 5 of the Telegraph Act, 1869. The word "relating" in the first exception refers back to "telegrams," and not to the words "telegraph maintained or used solely for private use"; the telegrams must relate to private business, and no money must be paid, and that would include the A to B lines. The words "owner thereof" would cover the case of a person for whose private use the line is maintained, who is just as much an "owner" as the Crown was in *Master of the Trinity House* v. *Clark* (2) and the lessee of the ship in *Sir John Jackson, Ld.* v. *Owners of S.S. Blanche.* (3) Either of the first two exceptions includes the A to B lines.

As to the fire alarms and communicating bells mentioned in the second schedule, if the Postmaster-General's claim is right, then every street door bell would be an infringement.

Cur. adv. vult.

May 27. COZENS-HARDY M.R. By s. 4 of the Telegraph Act, 1869, the Postmaster-General has the exclusive privilege of transmitting telegrams within the United Kingdom and of performing all the incidental services of receiving, collecting, or delivering telegrams, except as provided in s. 5. It was held in 1880, in *Attorney-General* v. *Edison Telephone Co. of London* (1), and it is not now disputed, that a telephone message

(1) 6 Q. B. D. 244.
(2) (1815) 4 M. & S. 288.
(3) (1908) 24 Times L. R. 384; [1908] A. C. 126.

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

Cozens-Hardy M.R.

is a "telegram" and that telephone lines are "telegraphs" within the meaning of the Act.

The principal question in this appeal is as to the extent of the exceptions from the monopoly of the Postmaster-General. The first exception is as follows: "Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof." The second exception is as follows: "Telegrams transmitted by a telegraph maintained for the private use of a corporation, company, or person, and in respect of which, or of the collection, receipt, and transmission or delivery of which no money or valuable consideration shall be or promised to be made or given."

As was pointed out by Stephen J. in delivering the judgment of the Court in the *Edison Case* (1), these exceptions resemble each other so closely that it is not easy to put a case of a telegram which would fall within the first exception and which would not fall within the second. The only distinction I can suggest is that the first may relate to the case in which a person who is owner of the telegraph also maintains it, and the second may include the case where the telegraph is maintained by a person who is not the owner.

Neither of these exceptions is strictly grammatical or easy to construe. It is contended by the appellants that telephonic lines between two places for affording communication between A at one end and B at the other end, which are erected and maintained by the appellants, but are worked and used independently of and without the intervention of any servant of the appellants, are within one or both of these exceptions. Swinfen Eady J. has rejected this contention, basing his judgment mainly on the words "solely for private use" in the first exception, which he holds to mean solely for the private use of the owner of the telegraph, including in the term "owner" his family and employees. There is some support for this view in the observations of Stephen J., although the precise point did not arise for decision in the *Edison Case*. (1) But the words

(1) 6 Q. B D. 244.

"solely for private use" are not found in the second exception, and, moreover, I doubt whether the "solely" can fairly be read as applying also to the words "relating to the business or private affairs of the owner thereof." The second exception seems to me to meet the present case. The telegraph is maintained by the appellants for the private use of their customers, and no money is paid for the transmission of telegrams by means of the telegraph. The "private use" of the customer extends to the case where he wants to communicate with the person at the other end of the wire, whether that person is his partner or employee, or his banker or his broker. In short, I think what has been conveniently described as an A to B private wire is within the exception, just as much as an A to A wire. It was urged by the Attorney-General that the fifth exception, which obviously refers to s. 9, sub-s. 8, of the Telegraph Act, 1868—a clear A to B telegraph—is wholly unnecessary if the earlier exceptions have the wide meaning attached to them by the appellants. But I think the fifth exception was probably inserted ex majori cautela at the instance of the railway companies, who feared that their existing privileges under the Act of 1868 might be prejudiced unless they were expressly preserved. Upon the whole I cannot agree with the decision of the learned judge upon the only point which was argued before him.

Assuming, then, that according to the true construction of the Act of 1869 A to B private lines are not within the Postmaster-General's monopoly, a further question presenting to my mind great difficulty arises upon the terms of the licence granted to the appellants by deed dated November 29, 1884. [His Lordship then dealt with the question of the construction of the licence, coming to the conclusion that the defendants were accountable to the plaintiff for royalties under clause 7 of the licence in respect of all the classes of lines mentioned in the first schedule, and continued:—]

As to the second question, the licence has no application; and it follows that, in my opinion, differing from Swinfen Eady J., the answer should be that the defendants are not acting in contravention of the exclusive privilege of the Postmaster-General. But as the other members of the Court take a different view on the

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

construction of the licence as to the answer to the first question, the appeal will be allowed upon both points.

FLETCHER MOULTON L.J. The subject of this appeal is the question whether or not the Postmaster-General is entitled to have the moneys received by the National Telephone Company, Limited, in respect of certain specified contracts made by them included in the calculation of royalties payable to him under the licence granted by his predecessor in the year 1884, under which the company carry on their business. The appellants contend that these contracts do not relate to anything done by them under that licence, which they contend relates only to such matters as are within the special privileges and powers granted to the Postmaster-General, the doing of which by the company would be unlawful but for the licence. The Crown, who are the respondents, reply that the acts referred to by these contracts would be unlawful but for the licence, and they further contend that, whether or not this is so, the terms of the licence are such that the moneys receivable by the company under these contracts are to be taken into consideration in calculating the royalties payable under that licence. It is upon these issues that we have to decide.

The first step, therefore, in deciding the present case is to ascertain with precision the limitations of the monopoly with regard to telegraphs granted to the Postmaster-General by the Telegraph Act, 1869.

From the preamble one would gather that the general intention of the Legislature was to make his exclusive privilege with regard to the transmission of telegraphic messages similar to that which he already possessed with regard to letters. But it would not be in accordance with sound principles of construction of Acts of Parliament to allow this reference in the preamble of the Act to interfere with or control the specific enactments as to the limits of the exclusive privilege which are to be found in ss. 4 and 5 of the Act. Sect. 4 creates his monopoly, and the language used is wide enough to include the transmission, reception, collection, or delivery of any message or other communication, transmitted or intended for transmission by electric signals, subject to the exceptions contained in s. 5. It is, therefore, with

the interpretation of these exceptions that we have alone to deal, and the circumstances of the case put it beyond doubt that none of the exceptions other than the first and second apply here.

These two exceptions are very similar in their nature, but there is a sufficiently marked contrast in the actual language used to shew that, although they may in some degree overlap, their delimitations are by no means coincident. The one is not the mere repetition of the other. If the corresponding clauses of the two exceptions be set in parallel columns thus—

Telegrams.	
For the transmission of which no charge is made	In respect of which or of the collection receipt and transmission or delivery of which no money or valuable consideration shall be or promised to be made or given.
relating to the business or private affairs of the owner (of the telegraph).	
Transmitted by a Telegraph.	
maintained or used solely for private use	maintained for the private use of a corporation, company or person

the similarities and differences are readily appreciable. In both cases the excepted telegrams must be transmitted by a telegraph maintained for private use, and no charge must be made in respect of their transmission. But the first exception insists that they must relate to the business or private affairs of the owner of the telegraph, but does not insist that no consideration shall be given for the collection, receipt, or delivery of the telegram, whereas the second exception does not insist that the telegram shall relate to the business or private affairs of the owner of the telegraph, but it requires that no consideration shall be given for the collection, receipt, or delivery of the telegram. Taking them both into consideration, I am of opinion that the Legislature intended that private telegraphs should be outside of the monopoly of the Post Office to this extent—that such a telegraph may be

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

Fletcher Moulton L.J.

used for sending telegrams relating to the business or private affairs of the owner, and that he is at liberty to deal with such telegrams when received just in the same way as he could with a message sent by himself without the intervention of a telegraph, i.e., he can pay for its collection, receipt, or delivery. But he may also use or permit to be used such a telegraph for the conveyance of other messages, but in that case no charge must be made for the collection, receipt, or delivery. In neither case must there be any charge for the transmission. In my opinion the combined exception thus granted by the Legislature reasonably protects the use of private telegraphs belonging to or maintained for a person for his private use. If, therefore, a firm chooses to establish private telegraphs to their bankers or their customers for the convenience of their business, and make no charge for the transmission, collection, receipt, or delivery of any of the messages sent thereby, they appear to me to be well within the exception. Nor do I think that it makes any matter whether the actual telegraphic wires belong to them or are only leased by them. The word "owner" is wide enough to cover both cases. It is quite sufficient if they acquire the right to use them exclusively for their private purposes, and pay for the maintenance of them, as is admittedly done in this case. It is not necessary for the purposes of this case to discuss the exact limitations of the exceptions to the monopoly of the Postmaster-General to any further extent. To sum up the conclusions to which I have come upon this point, I am of opinion that what was called during the argument an A to B line is outside the monopoly of the Postmaster-General.

We now turn to the licence and agreement of November 29. [The Lord Justice then considered the question of the construction of the licence at some length, coming to the conclusion that it was the common intention of the parties that telegrams which were statutorily outside the monopoly of the Postmaster-General were not to be affected by it. His Lordship then continued:—]

It remains now to examine the specific cases referred to in the special case in order to decide which, if any, are outside the statutory exemptions and within the agreement of licence. In

doing so it must be borne in mind that the Postmaster-General is the plaintiff in the case, and that the onus of the proof is upon him. Of the cases in the first schedule the only instances as to which I have a doubt are 2, 4, and 5; the others appear to me to be fairly within the statutory exemptions. No. 2 of the first schedule is the case that has given to me the greatest trouble, by reason of the payment for the key which gives to the holder something like an independent right of using the telegraph. But ultimately I have come to the conclusion that the payment is so trivial a matter that one ought not to look upon it as altering the substantially gratuitous use of the telegraph by the public for the purposes of the municipal fire department.

No. 4 is not free from difficulty, but on the whole the telegraph appears to me to be a private telegraph of the Cannon Brewery Company, Limited, used solely for their own business purposes. One may assume that the common director makes a practice of using it when at the Cannon Brewery for the purpose of communicating with the Mile End Distillery Company, Limited, about the business of that company, but there is nothing to lead me to the conclusion that that use is otherwise than gratuitous so far as the Mile End Distillery Company, Limited, is concerned.

There remains only No. 5 of the first schedule, which is the case of Keith, Prowse & Co., Limited, who have special telegraphs to sixteen hotels, thirty-two theatres, and two well-known stores. The facts of this case do not clearly appear in any of the documents before us, but it would seem that Messrs. Keith, Prowse & Co. have their own offices at the further extremity of these telegraphs, and they would thus be private telegraphs within the exemptions. But it is admitted that, although these are separate private telegraphs, they can by proper manipulation of the switchboard at Keith, Prowse & Co.'s establishments be made to give through communication between any of these hotels and theatres, or even between one hotel and another or one theatre and another. On the other hand it is clear that the expense of the telegraphs is entirely borne by Keith, Prowse & Co., and that they are intended to be used solely in connection with their business, and if any user is made of them by other persons

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

Fletcher Moulton L.J.

which is not in connection with Keith, Prowse & Co.'s business it is wholly gratuitous and not a matter of payment or right. Under these circumstances, although such a multiplex network is not that which is naturally suggested by the language of the exemptions, I cannot find anything which carries it outside their scope, and therefore I am of opinion that it is within the exemptions.

With regard to the second schedule, there is no question as to the licence because telephones are not used, and the only point that we have to decide is whether the cases set out therein are within the statutory exemptions or not. For the reasons I have given above I am of opinion that they are both within the statutory exemptions.

I am therefore of opinion that the judgment of the learned judge in the Court below was erroneous and that this appeal should be allowed.

BUCKLEY L.J. In this judgment the expressions "A to A line" and "A to A message" mean a line and a message in which the same person, A., is the speaker at the one end and the hearer at the other in the sense that he or some agent or servant of his is the person sending and the person receiving the message. Instances of an A to A line are a line from a man's house to his stable or to his office or to his country house. The expressions "A to B line" and "A to B message" mean a line and a message used at the one end solely by A., his servants or agents, but used at the other end by another person, B., or it may be by a multitude of persons, B. to Z., but so that the line is maintained for the private use of A. and the message is one relating to the business or private affairs of A. Instances of A to B lines are the line No. 7 in the first schedule to the special case from a firm to its bankers, No. 8 from a company to its solicitors. In each of these cases the person B. is one person or firm only. A case in which B. is not one person but a multitude of persons is No. 5, where Keith, Prowse & Co. have central telephonic offices in Poland Street with a switchboard there, by which they can not only put all their several head and branch offices into communication with each other (which would be A to A), but can

also put any one of them into communication with a number of hotels and theatres (which would be A to B in which B is a noun of multitude). It is obvious that this last case, No. 5, might be so used as that, say, the manager or servant of an hotel could speak direct to a theatre to engage seats, or could speak direct to another hotel to engage rooms for a customer if his own hotel were full. But in what I am going to say I shall assume that it is not used for any such purpose, but is used only for the purpose of enabling Keith, Prowse & Co. at the one end of the line at some one of their offices to speak to some other of their offices (which would be A to A) or to speak to some one of a multitude of persons, namely, the various theatres and hotels at the other end of the line, which would be A to B. The first question is whether A to B lines and messages (of which a number of instances are given in the first schedule) are lines in respect of which the company are accountable to the Postmaster-General for royalties. Upon this question the points argued have been two, namely, (1.) whether upon the true construction of s. 5 of the Act of 1869 A to B lines are excepted from the exclusive privileges of the Postmaster-General, and, (2.) if they are so excepted, whether upon grounds of estoppel the company are nevertheless liable for royalties.

As to the former, the true construction of sub-s. 1 of s. 5 of the Telegraph Act of 1869, I think, is as follows: The telegrams there spoken of must be (1.) telegrams for whose transmission no charge is made, and (2.) telegrams relating to the business or private affairs of the owner. These telegrams must be transmitted by a telegraph (that is to say, an installation of wires and instruments) maintained or used solely for private use. The word "owner" here means, I think, the person for whose private use the telegraph is maintained or solely used. It would be absurd to provide that no charge shall be made for A to A telegrams. Of course no charge is or can be made for a message sent by A. from his London to his country house. The sub-section must refer to telegrams in which some person is concerned other than the person called the owner. This necessarily introduces B. as a person who is to take part in the telegram to which reference is made.

C. A. 1908

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

Buckley L.J.

The second sub-section repeats the words "transmitted by a telegraph maintained for the private use," but drops the words "or used solely." It substitutes "person" for "owner" and drops the words which require that the telegram shall be one relating to the business or private affairs of the owner or person. On the other hand it enlarges the words which require that no charge shall be made for transmission by adding that no money or valuable consideration shall be given for collection, receipt, or delivery. That sub-section seems to me to contemplate, first, that while the telegraph must be maintained for, yet its user may be extended beyond, the private use of the person for whom it is maintained; and, secondly, that the telegram may relate to something other than his business or private affairs. This sub-section, I think, adds to the first sub-section the user by X. with A.'s consent of A.'s private telegraph for transmission of a message to which A. is not necessarily a party, and which need not relate to A.'s business or private affairs, provided that no value is given for the collection, receipt, transmission, or delivery of the message. The result is that, in my judgment, A to B lines and A to B messages are excepted from the exclusive privileges of the Postmaster-General provided the stipulations of those sub-sections are complied with.

The essential qualifications of a telegram excepted from the exclusive privileges of the Postmaster-General are that (subject to what I last said as to user by X. with A.'s consent) the line shall at one end be operated by one person only, namely, A., his servants or agents, but may at the other end be accessible to any number of persons who have occasion to communicate with A. The second sub-section seems to me very much larger than the first sub-section, but both the one and the other are covered by the essential provision that the telegraph must be maintained for the private use of a defined person (subject to his permitting messages without charge under the second sub-section), and this involves that its user at the one end shall (subject as aforesaid) be solely by the owner or person for whose private use it is maintained. It is not necessary to travel through the cases given in the first schedule.

If No. 5 be used with the limitation that I have suggested, it seems to me that they are all A to B lines which fall within the exceptions in s. 5, and that consequently they require no licence from the Postmaster-General. I ought to add as regards No. 2 that the charge there made is not a charge for transmission, but a payment which entitles the householder to a key. By paying for a key he is relieved from the necessity of applying to the police to open the fire alarm for him. His payment is made whether he does or does not use the line. It is not a payment for transmission at all, but a payment for access to the place which must be reached before transmission is possible. I am satisfied that the above was the only point upon which the parties stated the special case. A question of estoppel was, however, started in the course of the argument and has to be dealt with. [Having considered this question, his Lordship continued :—] In my opinion there was no point of estoppel.

It remains to deal with the second schedule to the special case. Those are instances of messages sent without spoken words. By means of electricity a bell is rung. Here I have nothing to do with the licence. The only question is under s. 5 of the Act of 1869. These are A to B lines and messages and are covered by what I said in the earlier part of this judgment. The appellants, in my judgment, are entitled to succeed. The questions in the special case should, I think, be answered to the effect (1.) that the defendants are not accountable to the plaintiff for royalties in respect of the lines specified in the first schedule, and (2.) that the lines in the second schedule are not in contravention of the Postmaster-General's privilege.

Solicitors : *Sir Robert Hunter ; W. E. L. Gaine.*

W. C. D.

C. A.
1908
May 29, 30.

In re SHARP.
MADDISON *v.* GILL.

[1907 S. 434.]

Will—Construction—Inaccurate Enumeration—Gift of Residue to A., B., and "the six Children now living" of C.—All but one of C.'s Children dead at Date of Will — Mistake — Rejection of Specified Number—Residue divisible amongst A., B., and surviving Child.

Where, on construction, the Court finds a dominant intention by the testator to benefit persons who answer a particular description or class, coupled with a mistake in the enumeration of the persons answering the description or composing the class, the Court will reject the inaccurate enumeration, whether the actual number in existence at the date of the death is less or more than that specified in the will.

Principle of *Garvey* v. *Hibbert*, (1812) 19 Ves. 125, applied to the case where the number of children was less than that specified in the will.

Decision of Joyce J., [1908] 1 Ch. 372, affirmed.

Appeal from the decision of Joyce J. (1)

By his will of March 13, 1905, John Sharp, the testator, gave legacies to John Gill and Edgar Gill, and "to the three daughters of my late niece Sarah Mitchell two hundred and fifty pounds each to the six children of the late Samuel Frederick Okey two hundred pounds each." The testator then gave the ultimate residue of his estate both real and personal to trustees "upon trust for the said John Gill and Edgar Gill the said three children of the said Sarah Mitchell and the said six children of the said Samuel Frederick Okey in equal shares as tenants in common."

By a codicil of May 17, 1905, the testator recited and declared as follows: "Whereas by my said will I have amongst other legacies and bequests given to the six children of the late Samuel Frederick Okey certain legacies and shares in my residuary estate Now I hereby declare that by such words 'the six children' of the late Samuel Frederick Okey I mean and intend to benefit the six children now living of the said Samuel Frederick Okey

(1) [1908] 1 Ch. 372.

by his first wife Elizabeth Okey formerly Elizabeth Sharp spinster and no others."

On December 17, 1906, the testator died.

The history of the family of Samuel Frederick Okey, and the facts, are given in greater detail in the report of the case in the Court below, but it is sufficient for the purposes of this report to state that at the date of the will and codicil, and of the testator's death, five of the six children of Samuel Frederick Okey by his first wife, Elizabeth Okey, were dead.

Joyce J. held, on an originating summons taken out by the trustees, that the children referred to in the will and codicil were the living children of Samuel Frederick Okey by his first wife Elizabeth; that the Court would reject the specified number "six" on the ground of mistake; and that the residue was divisible equally among the five specifically named legatees and the surviving child of Samuel Frederick Okey and his first wife Elizabeth.

The heir-at-law and next of kin appealed.

Upjohn, K.C., and *Sargant*, for the appellant. None of the authorities support the proposition that, where the number of children in existence is less than that specified by the will, the Court will reject the specified number on the ground of mistake and give the property to the smaller number. *Clarke* v. *Clemmans* (1) and *In re Dutton* (2), when examined, do not decide anything of the kind; in the former, Malins V.-C. dealt with the gift as if it were a class gift, which it was not, and in the latter, there was a good class gift. By the addition of other persons not in the same relationship to the testator as the class of children named, this is not a class gift, but a gift of one eleventh share to each legatee. *Lord Selsey* v. *Lord Lake* (3) is the only reported case which seems to have any application to the present, and that was a very special case.

In all the cases such as *Garvey* v. *Hibbert* (4), *Sleech* v. *Thorington* (5), *Stebbing* v. *Walkey* (6), and *Scott* v. *Fenoulhett* (7)

(1) (1866) 36 L. J. (Ch.) 171.
(2) [1893] W. N. 65.
(3) (1839) 1 Beav. 146.
(4) 19 Ves. 125.
(5) (1754) 2 Ves. Sen. 560.
(6) (1786) 2 Bro. C. C. 85.
(7) (1784) 1 Cox, 79.

C. A. 1908 SHARP, *In re.* MADDISON *v.* GILL.

the number of legatees described was less than the actual number living at the date of the will, and in that case only, will the Court reject the wrong enumeration and allow the larger number to take. The principle of *Garvey* v. *Hibbert* (1) is not to be extended, and it does not apply at all to a case like the present. The Court only resorts to a rule of this kind when it fails to discover by other means which of the class of persons is to take a benefit under the will: *Newman* v. *Piercey* (2); *In re Stephenson.* (3) Here there is no ambiguity on the face of the will; there is a plain gift to each of the eleven persons described, and the result of the decision of Joyce J. is to give an entirely different amount to the six who survive, by dividing the residue in sixths instead of elevenths and thus altering the testator's intention. The intention here is plain, and there is no question of defeating it on the ground of uncertainty: there is a good gift of one eleventh share to each of the six children notwithstanding that some of them were dead at the time of the gift; but there is a failure of the gift, and an intestacy, as to the aliquot shares of those who are dead. As a matter of construction there is no intention shewn to benefit the whole of a class; there is a gift to five named persons and to six others named by a general description which defines them as clearly as if they had been mentioned by name, and consequently there is a failure of the gift of five of these eleven shares.

Austen-Cartmell, for the surviving child of Samuel Frederick Okey by his first wife Elizabeth, and *Norton, K.C.*, and *H. Wace*, for J. and E. Gill and the children of Sarah Mitchell, were not called upon.

COZENS-HARDY M.R. In my opinion the decision of Joyce J. in this case was perfectly right. The testator has made a will which certainly has the merit of brevity. He gave, after certain legacies, his residuary estate upon trust for John Gill, Edgar Gill, the three children of Sarah Mitchell, and here I read in the words of the codicil "and the six children now living of Samuel Frederick Okey by his first wife in equal shares as tenants in common."

(1) 19 Ves. 125. (2) (1876) 4 Ch. D. 41, 47.
(3) [1897] 1 Ch. 75.

The facts are that there were at one time six children of Samuel Frederick Okey by his first wife, but at the date of the will, and of the death, only one of those six was living, and the question is whether the residue is divisible between John Gill, Edgar Gill, the children of Sarah, and this one child of Samuel Frederick Okey, or, in other words, whether it is divisible in sixths or whether it is divisible in elevenths. In my opinion it is divisible in sixths.

One view which may be taken—and I am not sure that it is not enough to dispose of the whole case—is that, reading the codicil into the will, it is a gift to John Gill and Edgar Gill, the three children of Sarah Mitchell, and such of the six children as are now living of Samuel Frederick Okey by his first wife. Of course, if that be the true construction, all difficulty is got over. I am disposed to think that is the true construction. If, however, that is not the true construction, then it seems to me that by a long series of authorities, which are absolutely binding upon this Court, it is a plain case where you have a governing intention to benefit children—not, I agree, forming a class in the sense in which that word is frequently used in legal language, but children described as being the children of a certain person—coupled with a mistake in the number of those children; and under those circumstances the Courts have held, and as it seems to me in accordance with common sense, that the dominant intention to benefit the members so described must have effect given to it by rejecting the inaccurate enumeration. Applying that rule, I find that the dominant intention was to benefit the children of Samuel Frederick Okey by his first wife. There was a mistake in the number then living, and you must treat it simply as a gift to the children or child living at the date of the will, and at the date of the death.

Now the authorities really seem to me to govern this case. I take one of the earliest cases—I think it is the case of *Sleech* v. *Thorington*. (1) There a capital sum was given to "the two servants that shall live with me at the time of my death" in equal shares. The testatrix had three servants, and it was held

(1) 2 Ves. Sen. 560.

C. A. 1908 — SHARP, *In re.* MADDISON *v.* GILL. — Cozens-Hardy M.R.

that the legacy was divisible in equal thirds. In that case it is quite true that no extra burden was thrown upon the residuary legatee, and it is also quite true that in the absence of extrinsic evidence, which scarcely could have been admissible in a case like that, the whole legacy might have been void for uncertainty but for the application of this rule. But Sir Thomas Clarke there held, following a prior decision of, I think, Lord Hardwicke, that when you found that the dominant idea was "servants living with me at the date of my death," you disregard the number two and you take the number three. A problem was put to Mr. Upjohn in the course of the argument: What would have been the result there if the gift had been "to my coachman my footman and my two domestic servants living with me at the date of my death," and supposing there had been three instead of two? I cannot bring myself to doubt that precisely the same result must have followed, and that the reasoning of Sir Thomas Clarke's decision in no way depends upon the fact that the legacy was given solely to the domestic servants living at the death, but the consequence must be exactly the same if they had been co-legatees with other persons named as "my coachman and my groom."

I do not propose to go through the subsequent authorities. It is scarcely necessary to refer to *Garvey* v. *Hibbert* (1), although that was a very strong case and a very leading case. That was a case where a legacy of 600*l.* was given to each of the three children of Dr. Duval. Dr. Duval had four, and it was held that the fourth was entitled also to a legacy of 600*l.*, the result being, of course, that 2400*l.* was taken out of the residuary estate instead of only 1800*l.* I am content to take the principle, for it is a principle, laid down by the Courts in the last two centuries, from the judgment of the Court of Appeal in *In re Stephenson* (2), which, somewhat singularly, Mr. Upjohn seems to regard as an authority in his favour. I do not know where I could find more accurately or more aptly stated the nature and the limitation of the rule. I take first of all the passage from the judgment of Lord Russell of Killowen (3): "The proposition

(1) 19 Ves. 125. (2) [1897] 1 Ch. 75.
(3) [1897] 1 Ch. 81.

must be limited to this—that, where the Court, as a matter of construction, arrives at the conclusion that a particular class of persons"—again not using the word "class" in a technical sense, but a particular description of persons—" is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the Court will reject the enumeration"; and Lindley L.J. in the same case (1) says: "If the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court should not and will not defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration." That is what the learned judge has done in the present case; that is what, if it be necessary to consider the cases at all on this will, I propose to do here. I think for the reasons I have given the decision of the learned judge was perfectly right, and that the residue is not divisible in elevenths, but is divisible in sixths.

BUCKLEY L.J. We have here a gift in favour of persons answering a particular description with a statement, but an erroneous statement, of the number of the persons who satisfy the description. Such cases have been the subject of decision where the gift was to the two servants that shall be living with the testatrix at the time of her death, and the facts were that there were three: *Sleech* v. *Thorington* (2); and where the gift was to the three children of A., the wife of B., 600*l.* each, and there were four such children: *Garvey* v. *Hibbert.* (3) In cases of that description it has been decided that where the number which the testator assigns is less than the true number, the number is to be rejected not only so as to alter the distribution among the category of persons of the amount to be divided (which was the case in *Sleech* v. *Thorington* (2)), but also so as to enlarge the number of legacies given, so as pro tanto to defeat the residuary legatee, which was the case in *Garvey* v. *Hibbert.* (3) Those

(1) [1897] 1 Ch. 83. (2) 2 Ves. Sen. 560.
(3) 19 Ves. 125.

C. A. 1908

SHARP, *In re.* MADDISON *v.* GILL.

Buckley L.J.

cases proceeded, I think, upon a principle which may be stated in either one of two ways. You may either say that the testator shewed a dominant intention, namely, that of benefiting the persons falling within the particular descriptive words, and a subordinate intention that each of them should take such a fractional interest as would result from the number which he erroneously states to be their accurate number, and that the Court gives effect to the dominant intention and disregards the subordinate intention; or you may say that if the gift be to three persons defined in a particular way, and there are four such, then inasmuch as it would be impossible to discriminate as between the four and select three of them, because all have equal claim to share, the Court disregards the erroneous statement of their number so as to escape defeating the gift altogether. In either case the result is that the Court disregards the figure which the testator has erroneously given as measuring the number of persons who fall within the qualification, and says the gift is to have effect in favour of the persons who answer the qualification, notwithstanding that he made a mistake as to their number.

The cases to which I have referred are cases in which the testator named too small a number. We have here to deal with a case in which the testator has named too large a number. What ought to be the result in that case? Suppose that a testator gave all his residuary estate to the three children of A. in equal shares as tenants in common, and there was only one child of A., what would be the result? It seems to me the result must be that the one child of A. would take the whole. For the dominant intention was that A.'s children should take; the subordinate intention, based upon the erroneous statement that there were three, was that each should take a third. This is essentially different from *In re Stephenson* (1), upon which Mr. Upjohn relied. The gift there was to the children of the deceased son (named Bamber) of a defined person, and there were three such deceased sons. No one could say which of them was intended. Here there is no doubt who is intended descriptively, but there is error as to their number. The gift here is for John Gill,

(1) [1897] 1 Ch. 75.

Edgar Gill, the three children of Sarah Mitchell, and the six children now living of Samuel Frederick Okey by his first wife Elizabeth Okey. There was only one child such as lastly described. Then to whom does the testator give? What did he intend to do? He intended to divide his residue amongst persons who, whether by way of name or by way of description, he indicates by his will, and you have to find those people. When you have found those people, then, as between them, he intends them to share equally. You find John Gill, you find Edgar Gill, and you find three children of Sarah Mitchell; then you look for the six children of Samuel Frederick Okey by his first wife, and you find only one. What did he intend as regards that last? He intended, I think, that the gift should take effect in favour of the person, or persons, who answered the description, and none the less because he erroneously said there were more persons falling within the description than was the fact. For these reasons I think that the decision below was right.

I may add that I agree with that with which the Master of the Rolls commenced his judgment, that if you read the words of the codicil into the will I am not at all sure that the whole case might not be decided by saying that by the words "the six children now living" he meant "such of the six children as shall now be living," and if that be so, the question I have discussed does not arise at all.

KENNEDY L.J. I am of the same opinion. It seems to me, if you read this will and codicil fairly together, the testator intended, as regards this residue of which he is disposing, that only those of the six children of Mr. Samuel Frederick Okey and Elizabeth Okey who were living should take under his disposition. But assume for a moment that is not strictly the way in which the document should be read so as to bring out that result. It seems to me, without repeating the arguments which have been given by the Master of the Rolls and Buckley L.J., that the decision which has been given, treating this as a mere error of number, and giving to the only child in effect that which, if six had been living, would have been divided

C. A. 1908 — SHARP, *In re.* MADDISON *v.* GILL.

among the six, is in accordance with principle, reason, and authority.

Solicitors: *St. Barbe Sladen & Wing; Guscotte, Wadham & Co., for Goodwin & Cockerton, Bakewell; Dangerfield & Blythe, for T. & W. G. Maddison, Durham.*

W. C. D.

C. A. 1908 — *May* 5, 6, 7.

SARPY *v.* HOLLAND.

[1897 S. 893.]

Copyright—International Copyright—Foreign Musical Composition—Right of Public Performance reserved—Notice in French Language—Copyright (Musical Compositions) Act, 1882 (45 & 46 *Vict. c.* 40), *s.* 1—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *ss.* 3, 4, 6—*The Berne Convention*, 1887, *Articles* 2, 7, 9—*Copyright (Musical Compositions) Act*, 1888 (51 & 52 *Vict. c.* 17), *s.* 3.

The provision in the Berne Convention, 1887, and the Orders in Council adopting the same, that the enjoyment of the rights thereby given to foreign authors is to be subject to the conditions and formalities prescribed by law in the country of origin of the work, means that it is to be subject only to those conditions and formalities, and not to those required by the law of the country in which the right is being enforced. On the true construction of the Berne Convention, the declaration that public performance of musical works is forbidden, thereby required to be made on the title-page of the work, is sufficient if made in the language of the country of origin. It need not be repeated in the language of the country in which the right is to be enforced. The Copyright (Musical Compositions) Act, 1882, s. 1, does not apply to such a case.

Decision of Neville J., [1908] 1 Ch. 443, reversed on this point.

THIS was an appeal from the decision of Neville J. (1)

The plaintiff was the agent-general for the British Empire of the Société des Auteurs, Compositeurs, et Editeurs de Musique, who had acquired by purchase from the authors and composers thereof the copyright of, and sole right of presenting and performing in Great Britain and its dependencies, certain pieces of music with French titles. The authors and composers of all

(1) [1908] 1 Ch. 443.

these pieces of music were foreigners; all the pieces had been first published in France after December, 1887, the date at which the Berne Convention came into force. Each of the pieces had on it the following notice in French—"Tous droits d'édition, d'exécution publique, de reproduction et d'arrangement, réservés pour tous pays y compris Suède Norvège et Danemark," and the following notice in English—"This composition may be performed without fee at any entertainments which are absolutely free."

The defendant Holland was the lessee of an hotel at Cricklewood at which there was a large saloon lounge. The defendant Savage was a violinist and leader of a band of four musicians, and had for some years been employed by Holland to play three evenings a week in the saloon. Holland paid him 16*s.* for each evening, and left the selection of music entirely to Savage. No charge was made for admission. It appeared that the band had on several occasions performed some of the pieces of music in which the plaintiff's society had the copyright. In March, 1907, the plaintiff commenced this action for an injunction to restrain the defendants from performing the said musical compositions or any of them.

Neville J. decided on the facts that the defendant Holland did not "wilfully cause or permit an unauthorized performance knowing it to be unauthorized," and was therefore protected by the Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17), s. 3. He also held that the Copyright (Musical Compositions) Act, 1882 (45 & 46 Vict. c. 40), s. 1, applied (1), and the

(1) "On and after the passing of this Act the proprietor of the copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

The Articles of the Berne Convention, 1887, applying to the case are:—

"Art. 2. Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives. The

C. A. 1908 SARPY v. HOLLAND.

notice thereby required to be printed on every copy must be in English. He therefore dismissed the action against both defendants. The plaintiff appealed.

Scrutton, K.C., and Martelli, K.C., for the appellant. Neville J. has decided against the plaintiff on the ground that the notice reserving the right to prevent public performance should have been in English as required by the Copyright (Musical Compositions) Act, 1882, s. 1. It has always been understood, since the Berne Convention, that the formalities required by the country of origin and those only need be observed by the author in order to gain all rights of copyright. Under the International Copyright Act, 1844, foreign authors had to fulfil all the requirements of the English Acts unless they were specially excepted by Order in Council. In consequence there grew up a chaos of Orders in Council, and the Berne Convention was agreed to in order to remedy that state of things. There are only two cases in which the Berne Convention speaks of notice—one in art. 7, which protects articles from newspapers and periodicals from reproduction where the authors and publishers have expressly forbidden it, and art. 9, which is the subject of the present discussion. In both it would be absurd to suppose that the notice must be given in the languages of all States who have joined or may join the union. It must have been intended to be only in the language of the country of

---

enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin."

"Art. 7. Articles from newspapers or periodicals published in any of the countries of the union may be reproduced in original or in translation in the other countries of the union, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical."

"Art. 9. The stipulations of Art. 2 apply to the public representation of dramatic or dramatico-musical works whether such works be published or not. . . . .

"The stipulations of Art. 2 apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance."

origin. This argument is strengthened by the provisions made in other cases. The International Copyright Act of 1852 (15 & 16 Vict. c. 12), s. 7, provides that articles in a foreign newspaper may be republished "unless the author has signified his intention of preserving the copyright therein, and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published." If Neville J.'s decision is right, that notice in a French newspaper would have to be in English.

It is now settled, and indeed Neville J. has decided in this case, that it is not necessary for a foreigner who claims copyright to register under the English Acts. In *Fishburn* v. *Hollingshead* (1) Stirling J. held that the proprietor of English copyright in a foreign painting must register under the Fine Arts Copyright Act of 1862 (25 & 26 Vict. c. 68), but in *Hanfstaengl Art Publishing Co.* v. *Holloway* (2) Charles J. refused to follow that case, and his judgment was approved by Lord Esher in *Hanfstaengl* v. *American Tobacco Co.* (3) The same reasoning applies to giving notice under the Act of 1882.

An agreement between Great Britain and the Austro-Hungarian Empire in 1893 and the Order in Council adopting the same—Copinger on Copyright, 4th ed. App. pp. cvi.-cix.—plainly provide that a foreign author is only bound to fulfil the conditions and formalities required in the country of origin. The Act of 1886 gives the Berne Convention the force of an English statute, and the true construction of art. 2 is that the rights given to the foreigner are subject only to the formalities and conditions required by the country of origin.

The defendant Holland continued the performances after notice, and we are therefore entitled to an injunction against him whether he did so in innocence or not: *Upmann* v. *Forester*. (4)

E. Clayton and *F. FitzGerald*, for the defendant Holland, were not called upon.

Strachan, K.C., and *C. Bray*, for the defendant Savage. The Berne Convention itself requires (by art. 9) that the author should print a notice on his title-page that he forbids public

(1) [1891] 2 Ch. 371.
(2) [1893] 2 Q. B. 1.
(3) [1895] 1 Q. B. 347.
(4) (1883) 24 Ch. D. 231.

C. A. 1908 SARPY v. HOLLAND.

performance of his work. It is natural that the notice should be in the language of the country where it is sought to enforce it. The Berne Convention provides that a foreigner who has done all that is necessary to secure copyright in his own country is to have the same rights in England as a native. He cannot have greater rights. But an Englishman cannot reserve the rights of public performance without giving the notice required by the Copyright (Musical Compositions) Act, 1882, s. 1, and that, being a notice required by an English statute, must be in English: *M'Bride* v. *M'Govern.* (1) The Order in Council adopting the Berne Convention made on November 22, 1887, refers, in s. 3, to the International Copyright Act, 1844, shewing that the foreigner was to take his rights subject to the same statutes and conditions as Englishmen. The judgment of Charles J. in *Hanfstaengl Art Publishing Co.* v. *Holloway* (2) shews the same thing. There is no hardship to the plaintiff in this case, for the songs sold to us were published for sale in England, the words had been translated into English, and the notice as to free performance was already printed in English. It would have been no more difficult to print the notice of reservation in English too. The defendant's contention does not deprive the author of his copyright, but only of his right to prevent public performance of his works, which is quite a different thing: see judgment of A. L. Smith L.J. in *Fuller* v. *Blackpool Winter Gardens and Pavilion Co.* (3) The International Copyright Act, 1886, which was passed to enable the Berne Convention to be adopted by Order in Council, expressly provides (s. 4) that "where an order respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the order." That provision would be absolutely unnecessary if the plaintiff's contention were right. Its insertion proves that all the provisions of the Acts apply except those relating to registration and delivery of copies.

(1) [1906] 2 I. R. 181. (2) [1893] 2 Q. B. 1.
(3) [1895] 2 Q. B. 429, 441.

Scrutton, K.C., in reply upon the last point only. Sect. 4 of the Act of 1886 was put in because the existing International Copyright Act of 1844 (7 & 8 Vict. c. 12), s. 15, enacted that all Orders in Council were to be read as sections of that Act, and that provision might seem to make registration according to that Act necessary. Probably, too, the Legislature thought it desirable to have a clear enactment on the point to prevent any confusion as to the effect of all the different Acts. Besides, the powers given by the Act are quite general; the Government might enter into agreements with countries not parties to the Berne Convention, and in such a case this provision might be required.

COZENS-HARDY M.R. This appeal raises a very important and by no means easy question—whether s. 1 of the Act of 1882 binds a French composer, who has complied with all the conditions and formalities prescribed by the law of France, to print in English on every copy of his composition a notice that the right of public representation or performance is reserved.

The answer to this question turns upon the true construction of the Berne Convention and of certain other Acts and Orders to which I must refer. The Berne Convention was originally in the shape of a draft, or proposal, having no effect at the time at which it was first entered into, namely, 1885. Its object was stated quite plainly in art. 1: "The contracting States are constituted into a union for the protection of the rights of authors over their literary and artistic works." Without going into details, it does seem to me that the protection to be given to authors was given with very little regard to the rights and interests of the public. That Berne Convention had and could have no operation. It was not competent to the Crown under existing English legislation to make an Order in Council sanctioning it, or to come into the Convention. However, the Act of 1886 was passed, which recited the Berne Convention, and that it was desirable that effect should be given to it so as to bind English subjects, and not only to confer upon foreigners certain privileges in England, but to enable

C. A. 1908 SARPY v. HOLLAND Cozens-Hardy M.R.

English subjects to secure, by coming into the Convention, certain rights and privileges abroad. That Act was followed by an Order in Council in 1886. I shall have to refer to both the Act and the Order more or less in detail; but the effect of these various Acts, Convention, and Orders in Council is that the Berne Convention has exactly the same effect as though it, together with the Order in Council, had been in the form of an ordinary English statute.

Now the Berne Convention, which I take first, because it is really first in point of date, though not in point of operation, by art. 2 says this, "Authors of any of the countries of the union." I pause here to observe that the Convention was originally one to which comparatively few States were parties; and that it contained a provision for other States coming in; and we are told that there are fourteen States which are now parties to the Convention. [His Lordship read the rest of the article, and continued:—] That is to say, the enjoyment of the rights is subject to the accomplishment of the conditions and the formalities prescribed by law in the country of origin, and the rights are not to extend in other countries for longer than the term which would be granted in the country of origin. Reading that section quite apart from any other section, I should be disposed to come to the conclusion that what was intended there was that an author who had accomplished or complied with all the conditions and formalities prescribed by the country of origin had done all that was necessary to entitle him to the privilege throughout the union. It seems to me unnatural to say that he is to have the rights conferred by this article only if, in addition to the conditions and formalities prescribed by the law of the country of origin of the work, he has also fulfilled the conditions and formalities prescribed by each of the countries of the union, other than the country of origin.

Then we come to art. 7. That provides for certain rights being given to articles from newspapers or periodicals. [His Lordship read art. 7.] Now, pausing there, it cannot be doubted, and I do not think it was really contested, that the prohibition against republication which is there contemplated (in one place it is called prohibition and in the other forbidding)

may be, and is, sufficient if it is in the language in which the newspaper or periodical is itself published. In short, there can be no possible ground for saying that a newspaper, or periodical, containing such a notice as is here contemplated at the beginning of each number, could be published in England on the ground that the notice was not in English. That seems to me too plain for argument. I therefore have arrived at this point, that when notice is required forbidding, or prohibiting, something from being done that notice need not be in the English language; it is sufficient if it is in the language of the country of origin.

Then I come to art. 9, upon which I think this question really turns for decision. [His Lordship read that article.] What we have to consider here is whether the authors of the music which we have before us, the composer being a Frenchman, and France being the country of origin, have sufficiently complied with the provisions of this article by printing in French, at the bottom of the first page of the publication, that the rights of public performance are reserved. It is said that cannot be so because the only rights which are given to a foreigner by the Berne Convention and by the Act confirming it are to be the same as and no greater than those conferred upon Englishmen; and if you look at s. 1 of the Act of 1882, it is there provided in perfectly plain language that a notice shall be printed on every copy. [His Lordship read that section and continued:—] It is said, and I think with force, that if s. 1 applies, that notice which is to be printed on the title-page must be a notice in English, because an obligation imposed by an English statute upon Englishmen, for the purpose of giving notice to Englishmen, must be in the English language. But where I part company with the argument is that I cannot hold, on the construction of the Berne Convention, taking art. 2 and art. 9 together, that it was intended to impose upon the foreigner claiming the benefits of this Convention the obligation of complying with, not merely the express stipulations of the Berne Convention, but also the additional formalities and conditions required by our law. Is there anything in the Act of 1886 which assists the argument? I think the strongest and best argument in favour of the respondents is probably to be found in that Act. That Act

C. A 1908 SARPY v. HOLLAND Cozens-Hardy M.R.

refers to the Berne Convention and recites that it was expedient to enable Her Majesty to accede to the Convention. Parliament therefore plainly contemplated, and the Act was passed with the express intention, that this country should accede to a Convention, the terms of which of course were perfectly well known and were before Parliament at the time. Then it goes on in s. 2 to give power to the Crown by Order in Council to accede to the Convention and to make it binding. Then in s. 4 of that Act there is this provision: "Where an order respecting any foreign country is made under the International Copyright Acts the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the order." It was very forcibly argued, particularly by Mr. Bray, that the express enactment, that the particular provisions with respect to registration and delivery of copies should be excluded in the case of international copyright, unless expressly included by the Order in Council, went strongly to shew that they were the only provisions which were to be excepted, and that, with that exception, every provision of the earlier Acts, including s. 1 of the Act of 1882, must apply to the foreigner just as it does to the Englishman. But on consideration I am unable to follow that argument. I think that there are two reasons which have been given by Mr. Scrutton in reply, and hinted at in the course of the discussion before, which quite account for and explain the existence of that section. In the first place, that is a section not limited to the Berne Convention at all, but empowering the Crown to make Orders in Council between this country and other countries not parties to the Berne Convention, in which provisions of this kind might be very necessary and very reasonable. Secondly, there is enormous force, I think, in the argument which Mr. Scrutton has pointed out, that in this terrible tangle of Copyright Acts, beginning with 3 & 4 Will. 4, partly what I may call local Acts and partly international Acts, it was of extreme importance to avoid any doubt or ambiguity, and to make it quite clear, beyond possibility of doubt, that a foreigner who had complied with the conditions of his own country was not bound also to register here, or to deliver copies of the works

in respect of which foreign copyright had been claimed. I cannot, therefore, attach the importance which we are asked to attach to s. 4. The Order in Council of 1887 provides that "the Convention as set out in the First Schedule to this Order, shall, as from the commencement of this Order, have full effect throughout Her Majesty's dominions, and all persons are enjoined to observe the same." Then s. 2 defines the countries to which it applies; and s. 3 provides that "the author of a literary or artistic work which, on or after the commencement of this Order, is first produced in one of the foreign countries of the Copyright Union shall, subject as in this Order and in the International Copyright Acts, 1845 to 1886, mentioned, have as respects that work throughout Her Majesty's dominions the same right of copyright, including any right capable of being conferred by an Order in Council under s. 2 or s. 5 of the International Copyright Act, 1844, or under any other enactment as if the work had been first produced in the United Kingdom, and shall have such right during the same period." I only pause to observe that the Copyright Act of 1882 is not mentioned there; it is not "subject to the Copyright Act, 1882"; and it is only by enforcing the chain of argument which Mr. Bray has forcibly put before us that we could hold that the Act of 1882 was incorporated with that Order, or, to put it in another way, that the rights conferred were only rights conferred subject to the provisions of the Act of 1882. I am unable to accept that view. It seems to me that a foreign author, who has done what the foreign authors did in this case, has done all that is necessary to entitle him to the benefits of the protection given by our Copyright Acts. I think I am entitled by way of confirmation of that view to refer to the treaty which Mr. Scrutton referred to, made between Great Britain and Austria-Hungary in 1893—I do not, of course, refer to it as controlling the construction—which put the proposition in perfectly clear and undoubted language. "In the British Empire, and in the Kingdom, and States represented in the Austrian Reichsrath, the enjoyment of the rights secured by the present Convention is subject only to the accomplishment of the conditions and formalities prescribed by the law of that State in which the work is first published; and no further

C. A. 1908 SARPY v. HOLLAND. Cozens-Hardy M.R.

formalities or conditions shall be required in the other country." Under these circumstances, with great respect to Neville J., from whom we are differing, I think that this appeal must be allowed upon this point; and it must be held that the plaintiff has a good cause of action against Mr. Savage, who by performing in public pieces in respect of which the plaintiff had the performing rights has been guilty of an offence.

The only other point is one upon which we did not call upon the respondent. [His Lordship then expressed his concurrence with the finding of Neville J., that the defendant Holland had not wilfully caused or permitted an unauthorized performance knowing it to be unauthorized, and continued:—] The appeal must be dismissed, so far as he is concerned, with costs; but so far as Savage is concerned the plaintiff must have judgment.

BUCKLEY L.J. We have here to deal with the right of public performance of a published musical work, the country of whose origin was France, and upon whose face the author has placed in the French language this notice. [His Lordship read the notice.] Neville J. has held that the proprietor of the right of public performance must fail in his action, because that notice is expressed in the French and not in the English language. I am unable to agree in that decision. I do not dispute—I think prima facie it is true—that if an English Act of Parliament requires that a person shall give a certain notice, he ought to give it in English. But that proposition is, I think, not always true. I may give an instance in which I think an English Act of Parliament would not have that effect. The International Copyright Act, 1852 (15 & 16 Vict. c. 12), deals with articles published in a newspaper in a foreign country. Presumably that would be a newspaper published in a foreign language. Sect. 7 of that Act of Parliament provides that certain articles there mentioned may, if the source from which the same is taken be acknowledged, be republished, or translated, unless the author has signified his intention of preserving the copyright therein and the right of translating the same in some conspicuous part of the newspaper or periodical in which the same was first published. I should say under that Act of Parliament the notice

would properly be given in the language in which the newspaper is printed. What we have to consider here is whether a certain notice, which is required by the Berne Convention, is bound to be in English. My first observation is that the Berne Convention is not a simple English instrument or document in the sense in which an English Act of Parliament is. It is an instrument to which a number of nations, each of whom speaks a different language, are parties, and in an instrument of that description I do not know that there is any necessary, or even prima facie, inference that the notice must be given in one language rather than another. Probably that would be a matter to be determined upon the circumstances under which, and the purposes for which, the notice was to be given. As regards the Berne Convention it seems to me quite plain, upon the contents of the document itself, that it is not true that every notice under that Convention need be in any particular language. Art. 7, dealing with the same subject-matter as the 15 & 16 Vict. c. 12, relating to newspapers or periodicals published in any of the countries of the union, speaks of a prohibition made at the beginning of the number of the periodical. There prima facie the prohibition would be expressed in the language of the periodical or newspaper in which it appeared. When I come to art. 9 I find that the notice is to be one in which the author has expressly declared on the title-page or commencement of the work something or other. In an instrument to which nations each speaking a different language are parties I should expect that the language in which the notice is to be given would presumably be that of the author who is giving the notice, that is to say, if he were a Frenchman he would give it in French, if a German in German, if an Englishman in English, and so on. I do not think that even prima facie I am entitled to read there "in which the author has expressly declared in English on the title-page." So far, therefore, it seems to me that I have nothing to lead me to say that the notice need be given in English; on the contrary, it seems to me that the inference would rather be the other way.

With that I pass on to consider the provisions of art. 2, because art. 9 is simply one which provides that the stipulations

C. A. 1908 SARPY v. HOLLAND. Buckley L.J.

of art. 2 shall apply if this particular notice is given. The first observation I make upon art. 2 is this. Charles J. in *Hanfstaengl Art Publishing Co.* v. *Holloway* (1), referring to this system of legislation, said: "The object of the legislation to me seems clear. It was not designed to impose disabilities, but rather, if they existed, to remove them, and to leave the foreign and native author as nearly as might be on an equality. The foreigner who complies with the requirements of the law of his own country is to be protected in England; the Englishman who complies with the requirements of English law is to be protected in the foreign countries of the Copyright Union." In this Court Lord Esher, in *Hanfstaengl* v. *American Tobacco Co.* (2), approved that language of Charles J. He says: "That learned judge was right in saying that the object of the legislation was not to impose disabilities, but rather, if they existed, to remove them. It seems to me most just in favour of the authors of all foreign countries that, if they have complied with the law of their own country, they shall be protected in this country, on condition that Englishmen who have complied with the laws of their own country shall be protected abroad. That is the construction of the Act that I adopt." That is the language of Lord Esher, which is, of course, binding upon us sitting in this Court. If I may respectfully say so, I entirely agree with it. I think Charles J.'s language was well founded. Reading art. 2 then, I find that it requires that the foreigner shall comply with the conditions and formalities prescribed by law in the country of origin. The respondent asks us to arrive at the conclusion that the foreigner is also to comply with the conditions and formalities prescribed by the English law. That is imposing upon him something more; it is not relieving him from anything, but exposing him to a further obligation. If the respondents are right, and if the foreigner is bound to do all that the English law requires, why require that he shall also do all that his own foreign law demands? Why should this country require that he should comply with the foreign law if he is already bound to comply with our law? Surely our law is good enough for us. It seems

(1) [1893] 2 Q. B. 10. (2) [1895] 1 Q. B 353.

to me, therefore, that this is very unlikely to be the intention. I think that sentence, "the enjoyment of these rights is subject to" and so on, means that it is subject only to what is there exacted. The foreign author has not, I think, also to comply with the English law.

Another way of looking at it is this. The first sentence of art. 2 says that the authors of countries of the union shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws grant to natives. The word "rights" there means, I think, benefits or privileges; it does not mean the right to register so as to obtain the privileges. The rights which are spoken of are those rights which reside in the author after he has complied with the conditions and formalities, and he is to have those same rights, the rights which, to take the particular case, the English law grants to the Englishman, and he is to have those rights if he has complied with the conditions and formalities prescribed by law in the country of origin of the work.

I do not go further into the matter. The Master of the Rolls has dealt with it at length. I agree with the reasoning and conclusions of his judgment. I think that the decision of Neville J., that the notice on the first page of the published work must be in the language of the country in which the right of public representation is sought to be protected, is erroneous. I think, therefore, that as regards the defendant Savage the plaintiff is entitled to an inquiry as to damages, and to an injunction in the proper form.

As regards the defendant Holland I do not think it is necessary to add anything to what the Master of the Rolls has said. It is conceded there cannot be, having regard to the Act of Parliament, any right of action against him for damages, and I think the plaintiff has failed to make out that he intends to continue the act that was a wrongful act. If that be so, there can be no grounds for an injunction as against him.

KENNEDY L.J. The Master of the Rolls and Buckley L.J. have so very fully dealt with all the points in this case in a manner in which I entirely concur that I propose to say but a

C. A. 1908 SARPY v. HOLLAND. Kennedy L.J.

few words upon two points in the case. In the first place, by way of confirmation of the views which they have expressed, it appears to me that art. 9 of the Berne Convention, in using the words in our English version of that Convention, "in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance," would prima facie or naturally mean a declaration which has been, as it were, a part of the publication as it originally came from the author. It seems to me that it is unreasonable as a matter of construction to suppose, as it was contended in the very able argument of Mr. Bray, that the parties representing all the various nations, the diplomats who came to this Convention, and who contemplated an unknown number of other States joining in, really thought that any author would, in order to get protection, have to print or publish or declare on the title-page in the language of every acceding nation that he desired to forbid the public performance of the work. I think that the mere fact that by art. 18 other countries were, in the view of the framers of the Convention, to become parties, strengthens the view that it could not have been intended that more should be done than to put the statement or declaration forbidding the performance in the language of the country in which the author was publishing his work.

This Convention was made between some four or five States to begin with, it has already extended to fourteen, and I dare say ere long will take in a dozen more; imagine the catalogue which would have to be put on the front page of the musical work referred to in art. 9, if this statement is to be put in, in every language known, as Mr. Bray says is necessary. I do not think it could have been intended. Of course, where there are clear words, in this or any other legal document which has to be construed by lawyers, you must look at the plain and natural meaning of the words, and not read into it an intention which that natural meaning does not warrant. But when you are looking at a business document of this kind, you may fairly say, unless the words have a very clear meaning to the contrary, that so unnatural a result could not have been one that was contemplated or intended.

The other matter to which I desire to refer is the argument upon the language of s. 3 of the Order in Council, which says that the foreign author shall have the same rights, "including any right capable of being conferred by an Order in Council under s. 2 or s. 5 of the International Copyright Act, 1844, or under any other enactment, as if the work had been first produced in the United Kingdom." Mr. Bray laid stress on the reference to the Act of 1844. But as I read that section, it does not mean to limit the rights to the rights capable of being conferred by an Order in Council under s. 2 or s. 5. It appears to me that the language does not sanction such a view. It does not exclude a further right, but it expressly states that the rights which may be given in respect of that work throughout Her Majesty's dominions, may *include* "any right capable of being conferred by an Order in Council under s. 2 or s. 5 of the International Copyright Act, 1844, or under any other enactment." I do not think that the limitation which the learned counsel's argument would impose by reason of the reference to those particular sections of the statute which are referred to in the Order is well founded.

Strachan, K.C., then asked that the case might be sent back for the trial of an issue which had not been decided in the Court below, namely, whether the statement on the pieces of music, "This composition may be performed without fee at any entertainments which are absolutely free," did not amount to leave and licence for the defendants' performance.

The Court agreed to hear arguments on the point the next morning.

May 7. *Strachan, K.C.*, and *Bray*, for the respondent Savage. Counsel for the appellant were not called on.

COZENS-HARDY M.R. Assuming that the licence pleaded was proved, I feel no doubt whatever that it did not justify what was done. This performance was paid for by Mr. Holland, the publican, with a view of gain; it was worth his while to pay sixteen shillings a performance. It was obviously part of the

C. A. 1908 SARPY v. HOLLAND.

means by which he attracted customers, and hoped to gain, and did gain, a profit in carrying on the business of an hotel. That being so, it seems to me impossible to contend that this was a performance at a gratuitous public entertainment.

BUCKLEY and KENNEDY L.JJ. concurred.

Solicitors: *Stanley, Woodhouse & Hedderwick; Boulton, Sons & Sandeman; Crawshay & Caldicott.*

J. R. B.

JOYCE J. 1908 *March* 20, 23, 30.

METROPOLITAN WATER BOARD *v.* SOLOMON.

[1907 M. 1265.]

Landlord and Tenant—Covenant not to assign without Consent—Power of Re-entry on Breach—Alienation—Statutory Powers—Waterworks Company—Metropolitan Water Board — Transfer of Undertaking — Leasehold Premises—Statutory Vesting—Metropolis Water Act, 1902 (2 *Edw.* 7, *c.* 41), *s.* 2, *sub-s.* 1; *s.* 24, *sub-ss.* 1 *and* 2; *s.* 37—*Metropolitan Water Board (Various Powers) Act,* 1907 (7 *Edw.* 7, *c. clxxiv.*), *s.* 53.

By virtue of the provisions of the Metropolis Water Act, 1902, the undertaking and property of the Grand Junction Waterworks Company, comprising (inter alia) leasehold premises demised to the company by a lease of March 14, 1881, were transferred to and became vested in the plaintiff Board. The lease contained a covenant on the part of the company, its successors and assigns, not to sell, assign, or underlet the demised premises without the previous written consent of the lessors, and also a power for the lessors to re-enter on breach of any of the lessees' covenants. The plaintiff Board did not require the premises in question, and proposed to underlet them to an intended tenant for the residue of their term less three days. The defendants, in whom the leasehold reversion was vested, refused their consent. In an action by the plaintiff Board for a declaration that, notwithstanding the covenant, they were entitled, in exercise of their powers under the Metropolis Water Act, 1902, and the provisions of the Public Health Act, 1875, incorporated therein, and the Metropolitan Water Board (Various Powers) Act, 1907, to sell, assign, or underlet the premises without the previous consent in writing of the defendants:—

Held, that what the plaintiff Board possessed was not an absolute term of years, but only a lease liable to be determined in the event (inter alia) of an assignment or underletting without the previous written consent of the defendants; that the plaintiff Board's statutory powers

only enabled it to dispose of such estate and interest as it might have, and did not deprive the defendants of their right to re-enter for breach of the covenant against assigning or underletting without the necessary consent; and that, consequently, the action failed.

ACTION.

By an indenture of underlease dated March 14, 1881, and made between C. F. Du Pasquier, G. Humby, and F. C. Ellis of the one part, and the Grand Junction Waterworks Company of the other part, certain premises in the parish of St. George, Hanover Square, in the county of London, were demised by the said C. F. Du Pasquier, G. Humby, and F. C. Ellis to the company, their successors and assigns (such assigns to be by licence as thereinafter mentioned), for the term of forty years from March 25, 1880, at the yearly rent of 500*l.* thereby reserved and the covenants and conditions therein contained, and the company thereby covenanted that they, their successors and assigns, should not nor would sell, assign, or underlet the demised premises or any part thereof without the consent in writing of the said C. F. Du Pasquier, G. Humby, and F. C. Ellis, their executors, administrators, or assigns, first had and obtained; and the indenture contained a power of re-entry if the company, their successors and assigns, should not (inter alia) observe and perform all and every of the covenants, agreements, and conditions therein contained and on their part to be observed and performed.

By the Metropolis Water Act, 1902, the undertaking, property, and assets of the Grand Junction Waterworks Company were transferred to the plaintiffs, in whom the underlease and the property thereby demised were now vested.

The defendants were the assigns of C. F. Du Pasquier, G. Humby, and F. C. Ellis, and the leasehold reversion in the demised premises was now vested in them.

The demised premises had been used by the Grand Junction Waterworks Company for their head offices, but the plaintiffs, having their offices elsewhere, did not require the premises in question, and proposed to grant an underlease of them to a respectable and responsible tenant whom they had found for the residue of the term to which they were entitled (less three days) at the yearly rent of 1100*l.* The plaintiffs thereupon applied to

JOYCE J. 1908 METROPOLITAN WATER BOARD v. SOLOMON.

the defendants for their consent to the underlease to the proposed tenant, but the defendants refused to give their consent.

The plaintiffs then commenced this action, claiming (inter alia) a declaration that notwithstanding the above-mentioned covenant they were entitled to sell, assign, or underlet the demised premises in the exercise of and in accordance with their statutory powers without the consent in writing of the defendants first had and obtained.

Norton, K.C., and *H. Burrows*, for the plaintiffs. The plaintiffs are compulsory assigns of this lease. It is vested in them by statute. The consent of the lessor to the assignment to the plaintiffs is taken away by the operation of the statute : *Slipper* v. *Tottenham and Hampstead Junction Ry. Co.* (1) ; and, being compulsory assigns, they are not bound by the covenant not to assign without licence.

By virtue of the provisions of the Metropolis Water Act, 1902, this lease is vested in the plaintiffs for the purposes of their statutory duties, and they are not bound by the covenants in the lease so far as they are inconsistent with their statutory powers. The demised premises are not required by the plaintiffs for the purposes of their undertaking, and the Legislature, foreseeing that such a contingency might arise, conferred a power of alienation on the Water Board by s. 24, sub-s. 1 (*a*), of the Act, and by sub-s. 2 incorporated s. 177 of the Public Health Act, 1875, which authorizes the Board, with the consent of the Local Government Board, to let for any term any lands as and when they can conveniently spare the same. We submit that by virtue of those enactments the plaintiffs can underlease these premises without the consent of the defendants.

The covenant not to assign without consent is overridden by the statutory power to assign : *Baily* v. *De Crespigny* (2) ; *Newington Local Board* v. *Cottingham Local Board* (3) ; *Kirby* v. *Harrogate School Board* (4) ; *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson.* (5)

(1) (1867) L. R. 4 Eq. 112.
(2) (1869) L. R. 4 Q. B. 180.
(3) (1879) 12 Ch. D. 725.
(4) [1896] 1 Ch. 437.
(5) [1898] 2 Ch. 394.

[JOYCE J. Do you contend that an assignee from the Water Board would not be bound by the covenant?]

No; we contend that the plaintiffs could sell without the consent of the defendants, but on sale the covenant would revive and be binding on the purchaser—*Bird* v. *Eggleton* (1)—the reason being that an assignee from the Water Board would not be exercising statutory rights.

Even supposing that the effect of s. 45 (*b*) is to put the Water Board in the position of having covenanted not to assign without consent, such a covenant would be ultra vires as contracting the Board out of its statutory powers and duties: *Ayr Harbour Trustees* v. *Oswald* (2); *In re South Eastern Ry. Co. and Wiffin's Contract.* (3) But that section is in reality only a conveyancing section, and is "subject to the provisions of this Act," including the power to lease surplus lands.

A further power of alienation is given to the board by s. 53 of the Metropolitan Water Board (Various Powers) Act, 1907.

Younger, K.C., and *H. B. Samuel* (*G. F. Hart* with them), for the defendants. This question turns exclusively on the construction of the Metropolis Water Act, 1902. The obligations of the Water Board under that Act in respect of this lease are the same as the obligations of the Grand Junction Waterworks Company, and just as the company could not assign without consent, so neither can the Board.

There could not be wider words than in s. 2, sub-s. 1, namely, "debts, liabilities, and obligations"; and the transfer of the undertaking is by s. 37 extended to include all "real and personal" property, but "subject to all debts, liabilities, and obligations."

Sect. 2, sub-s. 1, vests the property with all its liabilities and obligations subject only to the express provisions of the Act, such, for instance, as are contained in s. 9 relative to the New River Company and in s. 11 relating to certain special boroughs and districts. Sect. 45 shews that every obligation which was imposed on the original company is to be as completely binding on the Water Board. There has been a

(1) (1885) 29 Ch. D. 1012. (2) (1883) 8 App. Cas. 623.
(3) [1907] 2 Ch. 366.

JOYCE J. 1908 METROPOLITAN WATER BOARD v. SOLOMON.

statutory transfer of those obligations. Private rights cannot be taken away without express words or necessary implication—*Metropolitan Asylum District* v. *Hill* (1)—and none such is to be found in this Act, nor is there in the Act any provision for compensating damage.

Further, there is nothing in the Act to prevent the obligation being binding even if it had been one entered into by the Water Board, for, under s. 24, sub-s. 1 (*b*), the Board could, if necessary, have acquired buildings and offices by lease subject to a covenant not to assign.

The plaintiffs rely on sub-s. 2 of s. 24, incorporating s. 177 of the Public Health Act, 1875, but the power thereby conferred is not one for the purposes of the Metropolis Water Act; it is merely a matter of the administration of the Act and does not exonerate the Board from the obligation not to let without consent, and s. 53 of the Metropolitan Water Board (Various Powers) Act, 1907, does not give the Board any wider powers.

The cases cited do not support the plaintiffs' proposition. There is only a power to sell in this case, and not a duty, as there was in *Newington Local Board* v. *Cottingham Local Board.* (2) *Kirby* v. *Harrogate School Board* (3) was a case of remedy, not of obligation; there was no contract in that case. In *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (4) the injury complained of was done by the company in carrying out the express purposes for which it was created, and it was held that the only remedy was under the Lands Clauses Consolidation Act, and not under the covenant. *Ayr Harbour Trustees* v. *Oswald* (5) and *In re South Eastern Ry. Co. and Wiffin's Contract* (6) were cases relating to the statutory powers for which the two undertakings were created.

Norton, K.C., in reply. The powers given by the Act are inconsistent with the restriction against alienation. The statutory power overrules the private right of the lessors to forfeit the lease on sale without their consent. We do not contend that it enables the plaintiffs to break all the other covenants. It is true

(1) (1881) 6 App. Cas. 193.
(2) 12 Ch D 725.
(3) [1896] 1 Ch. 437.
(4) [1898] 2 Ch. 394.
(5) 8 App. Cas. 623.
(6) [1907] 2 Ch. 366.

there is no provision for compensation, but that makes no difference: *Baily* v. *De Crespigny*. (1) It is not injury of every sort on the part of a company that gives rise to compensation. There is no difference between the duty and the power of a company, and it is not material whether it is the plaintiffs' duty or their power to sell: *In re South Eastern Ry. Co. and Wiffin's Contract*. (2)

Cur. adv. vult.

March 30. JOYCE J. In March, 1881, a lease was granted to the Grand Junction Waterworks Company of all that piece of ground, with the buildings thereon, No. 32 on the north side of Brook Street, and all other the premises comprised in a certain recited indenture of lease for the term of forty years, with various covenants on the part of the lessees, and in particular a covenant, in addition to a covenant as to the user of the premises, not to sell, assign, or underlet the premises or any part thereof without the consent of the reversioners first had and obtained; and there was a power of re-entry reserved to the reversioners in the event of the lessees or their assigns not observing and performing all the covenants on their part to be observed, kept, and performed.

I need hardly say that, notwithstanding the covenant not to assign without consent, an assignment without consent would be perfectly valid to pass the term, but the reversioners might, if they chose to do so, re-enter and avoid the lease as from the time of re-entry. This lease is therefore the grant of a term determinable by the reversioners at their option in certain contingent events, and in particular of an assignment or underletting without consent. No suggestion has been made that any of the covenants or provisions in this lease was ultra vires on the part of the Grand Junction Waterworks Company, or not binding upon them, or that the reversioners might not lawfully have re-entered upon any breach of the lessees' covenants by the Grand Junction Waterworks Company. Further, this covenant against assignment or underletting without consent runs with the term, and every assign is just as liable in respect of it as the original lessees.

(1) L. R. 4 Q. B. 180. (2) [1907] 2 Ch. 366.

JOYCE J. 1908 METROPOLITAN WATER BOARD v. SOLOMON.

Then in 1902 came the Metropolis Water Act of that year, constituting the Water Board and transferring to that Board a portion of the undertaking of the New River Company, and, as to each of the other metropolitan water companies, including the Grand Junction Waterworks Company, the whole of its property, assets, and undertaking, with its debts, liabilities, and obligations. It is now contended that the effect of this Act, with reference to the leasehold premises in question, is to empower the Water Board, if and whenever it may please to do so, to sell and dispose of the premises and assign or underlet the same to any person it may choose, and that, notwithstanding the provisions of the lease in reference to assigning or underletting without consent, an assign or underlessee from the Water Board could not be disturbed by the reversioners under the power of re-entry for a breach of the covenant not to assign or underlet without consent.

Now the Act contains no provision of any kind for compensation to private individuals in respect of any interference with their rights or property by reason of the exercise of the powers of the Water Board. In the case of *Canadian Pacific Ry. Co.* v. *Parke* (1) in the Privy Council, there being present the Lord Chancellor (Earl of Halsbury), Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Shand, and Lord Davey, the judgment was delivered by Lord Watson. He says (2): "Wherever, according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of the law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others." Later, on the same page, referring to the case of *Metropolitan Asylum District* v. *Hill* (3), the passages which were material in the judgment in that case having been cited, Lord Watson says: "In the same case"—that is in *Metropolitan Asylum District* v. *Hill* (3)—"Lord Blackburn said, 'It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private right of individuals to shew that by

(1) [1899] A. C. 535. (2) [1899] A. C. 544, 545.
(3) 6 App. Cas. 193.

express words, or by necessary implication, such an intention appears.' The noble and learned lord also observed: 'The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.'"

Counsel for the Water Board before me cited and relied upon *Slipper* v. *Tottenham and Hampstead Junction Ry. Co.* (1), *Baily* v. *De Crespigny* (2), and *Kirby* v. *Harrogate School Board* (3), but I do not think that these authorities have any application to the present case, that is to say, to a sale or underletting proposed to be made by the Water Board, not for any particular purpose authorized or prescribed by statute—as when an ordinary proprietor or lessee is compelled to sell to a railway company for the purpose named in their Act—but to a voluntary underletting merely because the Board no longer requires the premises for its own use. Here there is no question of the purchase or sale under statutory powers of a piece of ground, with or without buildings upon it, for the purpose of its being used or appropriated to a purpose such, for example, as the construction of the railway specified, authorized, and described by the statute conferring the power of purchase and compelling the owners to sell either by agreement or else under the provisions of the Lands Clauses Act relating to sales otherwise than by agreement.

There has been, as I understand it, a vesting by statute in the new Water Board of the entire undertaking of the Grand Junction Waterworks Company just as it was, with all its property and assets of every kind, together with and subject to its debts, liabilities, and obligations. To that, of course, no consent of the reversioners was requisite; indeed this vesting was in no sense a breach of any of the covenants of the lease either by the lessee or any one else. After the transfer and vesting effected by this

(1) L. R. 4 Eq. 112. (2) L. R. 4 Q. B. 180
(3) [1896] 1 Ch. 437.

JOYCE J
1908
METROPOLITAN WATER BOARD v. SOLOMON.

Act, the position as between the Water Board, the owners of the term, and the reversioners is altogether different from and in no way analogous to what it would have been if the Water Board were now purchasing the lease under the provisions of the Lands Clauses Acts. In the latter case the decisions which I have mentioned as having been cited to me would, I suppose, be applicable.

[His Lordship then proceeded to consider the particular provisions of the Act of 1902, and observed:—] Moreover, even if this lease had been sold to a railway company under the compulsory powers of the Lands Clauses Act, still the covenant not to assign without consent would not thereby have become inoperative or inapplicable to such a sale, although the mode in which the reversioners were to obtain compensation would have been varied. That is the result of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (1): see particularly Lindley M.R.'s judgment.

The effect of this Act of 1902 so far as alienation is concerned is, I think, merely to empower the Board to dispose of such estate or interest as it may have; it may assign this term, and such assignment would be valid; but I find nothing to take away the right of the reversioners afterwards, if they are so minded, to put an end to the lease by re-entry for the breach of covenant not to assign without consent, and I think this would be even so if the reversioners could not (I do not say they could not) recover damages in an action against the Board for a breach of any of the lessees' covenants in the lease.

It is true that sub-s. 2 of s. 24 incorporates mutatis mutandis s. 177 of the Public Health Act, 1875, which provides: "Any local authority may, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same"; but the local authority is thereby empowered to let only such lands as they may possess. So far as I am aware it has not hitherto been suggested that, if a local authority hold or occupy offices under such a lease as this of March 14, 1881, to the Grand Junction Waterworks Company, it could, in disregard of the rights of the reversioners, underlet such offices without consent or rather I

(1) [1898] 2 Ch. 394.

should say that I see no reason why, if this were done, the reversioners are prevented from exercising their power of re-entry and dispossessing the underlessee. What the Water Board possesses is not an absolute term of years, but only a lease liable to be determined in certain contingencies, one of them being an assignment or underletting without the consent of the reversioner.

Under the Settled Land Act a tenant for life may sell settled land or any part thereof, but if such a lease as this were comprised in the settled land it does not entitle him to dispose of such land without reference to the covenant against assignment without consent or the proviso for re-entry. The covenant not to assign, or underlet without consent, running with the term, and the powers to re-enter being inherent in the reversioner, it does not appear to me to be necessary for the defendants to have recourse to the provisions of s. 45 of the Act of 1902, although I am by no means sure that the provisions of s. 45 (*b*) are not applicable

The plaintiffs also insisted upon s. 53 of a local Act of 1907, the title of which is "To empower the Metropolitan Water Board to make waterworks and other works and to acquire lands and for other purposes." If the Water Board be not entitled under the Act of 1902 to alienate without the consent of the reversioners, I do not think that s. 53 of the Act of 1907 improves its position. The object of the section is not to deprive the reversioners of their rights under the lease, or to interfere with the exercise of any of their powers under it, but merely to free the Board from such disability as it would otherwise have been under by reason of anything contained in the Lands Clauses Acts or any of the other Acts which are referred to in s. 53. Besides, in my opinion, it only empowers the Water Board to dispose of such lands or interests therein as are vested in the Board, and the Board has no title to these leasehold premises except subject to the power of re-entry reserved to the reversioners by the express terms of the lease.

The result is that in my opinion this action cannot be maintained and must be dismissed with costs.

Solicitors: *Walter Moon*; *Hermann H. Myer & Co.*

R. M.

JOYCE J. 1908 June 3.

FURNESS, WITHY & CO., LIMITED *v.* PICKERING.

[1908 F. 180.]

Practice—Third Party Notice—Leave to Issue—Service on Plaintiff—Ex parte Application—Rules of Supreme Court, 1883, *Order* XVI., *r.* 48.

An application in the Chancery Division for leave to issue and serve a third party notice under Order XVI., r. 48, need not be served on the plaintiff in the first instance, but may be made ex parte.

It is always competent to the Court or judge to require the plaintiff or any other person to be served with the application.

Wye Valley Ry. Co. v. *Hawes*, (1880) 16 Ch. D. 489, commented upon.

ADJOURNED SUMMONS.

This was an application by the defendants for an order that they might be at liberty to issue and serve on the person therein named a third party notice.

The plaintiffs in the action were the above-named company and their trustee, who held on their behalf a large number of shares in the defendant company, and the defendants were two of the directors of the defendant company and the defendant company. The plaintiffs claimed (inter alia) that the defendant directors should make good to the defendant company certain sums of money which they had applied, as the plaintiffs alleged, for improper and wrongful purposes.

The defendant directors desired to serve the third party notice upon their co-director, who was also a director of the plaintiff company, and who, as they alleged, was privy to, and equally responsible with them for, the payments in question, and from whom they were entitled to contribution in the event of the plaintiffs being successful in the action.

Notice of the present application was served on the plaintiffs, who appeared and opposed the making of the order in chambers, where the Master refused the application, which was then adjourned to the judge in Court and now came on for hearing.

Carden Noad, for the defendants. This application has been served on the plaintiffs in accordance with the practice in the Chancery Division as stated on p. 196 of The Annual Practice,

1908, where reference is made to *Wye Valley Ry. Co.* v. *Hawes* (1) as an authority for the statement.

[JOYCE J. I do not think that *Wye Valley Ry. Co.* v. *Hawes* (1), which was a case under the old Rules of the Supreme Court, 1875, is really an authority for the statement.]

The plaintiffs are not in any way concerned with this application, and I submit that they have no locus standi. In the King's Bench Division the application is made ex parte, and if service of this application was not necessary, then I make the present application ex parte. If the third party appears pursuant to the notice, then upon the subsequent application under Order XVI., r. 52, the defendants will have to satisfy the Court that there is a question proper to be tried as to the liability of the third party, but all they have to shew on this occasion is that their claim is bona fide and that they have a prima facie case for contribution—*Carshore* v. *North Eastern Ry. Co.* (2)—and I submit that they have done so.

Hughes, K.C., and *Hodge*, for the plaintiffs. The Court has a discretion in allowing the notice to be issued, and upon the question of the exercise of that discretion the plaintiffs have a right to be heard: *Bower* v. *Hartley* (3); *Wye Valley Ry. Co.* v. *Hawes* (1); *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (4); and that implies that the plaintiffs should be served with the application. Another reason why the plaintiffs should be served is that a third party may embarrass or prejudice the plaintiffs' case, and the present plaintiffs oppose on these grounds the granting of this application.

Further, the defendants do not set up a case of indemnity, but only one in which they allege a right to contribution; but we submit that they are joint tortfeasors and cannot therefore get contribution from the third party, and consequently have not shewn a prima facie case. If in fact they are entitled to contribution, then the question should be tried after the trial of the action: *Eden* v. *Weardale Iron and Coal Co.* (5); *In re Salmon.* (6)

Carden Noad in reply.

(1) 16 Ch. D. 489.
(2) (1885) 29 Ch. D. 344.
(3) (1876) 1 Q. B. D. 652.
(4) (1886) 34 Ch. D. 261.
(5) (1887) 34 Ch. D. 223.
(6) (1889) 42 Ch. D. 351.

JOYCE J. 1908 FURNESS, WITHY & CO., LIMITED v. PICKERING.

JOYCE J. This is an application by the defendants under Order XVI., r. 48, to issue a third party notice against a person from whom they claim contribution in the event of the plaintiffs succeeding in the claim made in the action.

I am very strongly of opinion that it is of the highest importance that there should be uniformity of practice in the different chambers of the several Judges of the Chancery Division as also between the Chancery Division, so far as the circumstances will admit, and the King's Bench Division in the same class of cases. The books of practice all say, and I have no reason to doubt the statement, that the application for such an order as this is made ex parte in the King's Bench Division. The same books say that in the Chancery Division the order is made on an application of which notice must be given to the plaintiff, and in support of that the case before Hall V.-C. of *Wye Valley Ry. Co.* v. *Hawes* (1) is cited. In my opinion the case before Hall V.-C. is not a decision to that effect. There the application was made ex parte, and the Vice-Chancellor said distinctly (2) that he could make the order. At that time this practice in reference to third parties was new and the course of the procedure under it not yet settled, but the Vice-Chancellor certainly went on to say that he thought it was better that notice should be given to the plaintiffs. My opinion is that an order in such a case as this may be made ex parte, although it is always competent to the Master or judge to require the plaintiff or any other person to be served. But as a general rule I think that the application ought to be made ex parte.

In this case the plaintiffs claim against the defendants, who are two directors of a company, that they should make good certain sums which the plaintiffs say have been misappropriated by the defendants—moneys of the company—inasmuch as they have been applied to an item of expenditure which it is said was illegal and ought never to have been made. With reference to that the defendants say that they are not the only directors, and that there is another director who is equally responsible to them for these payments, and if the plaintiffs succeed in this action against the present defendants, the latter are entitled to

(1) 16 Ch. D. 489. (2) 16 Ch. D. 491.

contribution from this third person. Without prejudice to what I might have to decide if an application be made by this third person to discharge the order on notice or anything of that kind, I am, as at present advised, of opinion, having regard to what I have heard from Mr. Noad, that there is or will be a prima facie case for contribution against this third party. In that state of things I must make the order.

The plaintiffs have appeared and have hotly contested the matter before me. I confess that I am not disposed to pay much attention to what they have to say on the present occasion, but on a future occasion, when the necessary application is made under r. 52 of the same order for directions as to what course is to be taken, they may have a good deal to say, and whatever they say on that occasion will deserve attention and will have to be most carefully considered. I shall take care, to the best of my ability, that such an order be made as will protect them fully from the evil consequences which Mr. Hughes says will necessarily ensue from the granting of this order.

As at present advised, it appears to me that the defendants will have a prima facie case for contribution against this third person, and, therefore, I grant leave to serve the notice, and the plaintiffs will be entitled to the costs in chambers, as they were served with the notice, I think unnecessarily, but I cannot give them any other costs than the costs of attending in chambers.

Solicitors: *Holman, Birdwood & Co.; W. A. Crump & Son.*

R. M.

SWINFEN EADY J.

1908

June 2.

In re NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED.

ANSTIS' AND McLEAN'S CLAIMS.

[00232 of 1907.]

Company—Allotment—Minimum Subscription—Application Money—Paid to and received by the Company—Cheques cleared and honoured after Allotment—Delay in Presentment—Irregular Allotment—Notice of Avoidance within one Month of Statutory Meeting—Legal Proceedings after one Month—Companies Act, 1900 (63 & 64 *Vict.* c. 48), *ss.* 4, 5.

Where a cheque for application money for shares forming part of the minimum subscription for allotment is received on the day of allotment, but not paid into the company's bank until some days later, the application money cannot be treated as "paid to and received by the company" before allotment within s. 4 of the Companies Act, 1900, although the cheque is duly honoured.

Mears v. *Western Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, 360, applied.

Glasgow Pavilion, Ld. v. *Motherwell*, (1903) 6 F. 116, distinguished.

Sect. 5, which renders an allotment to an applicant in contravention of s. 4 "voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later," does not require actual legal proceedings to be taken within the month as a condition of avoidance. Notice of avoidance within the month followed by prompt legal proceedings after the month is sufficient.

Semble, the notice need not specify the ground of avoidance.

SUMMONS for rectification of register.

The company was incorporated on March 16, 1906, with a capital of 152,500*l.* divided into 150,000 ordinary 1*l.* shares and 50,000 deferred 1*s.* shares.

The qualification of a director was the holding of shares of the nominal value of 250*l.*

The company was dormant until May 27, 1907, when it issued a prospectus offering 100,000 ordinary shares for public subscription and stating that the minimum subscription on which the directors might proceed to allotment was 35,000 ordinary shares which had been underwritten. The shares were payable as follows:—1*s.* on application, 4*s.* on allotment, 5*s.* one month

after allotment, and the balance in calls of not more than 5*s.* per share. The shares might be paid up in full on allotment, interest at the rate of 5 per cent. being allowed in respect of the prepayment of instalments.

The applications on or before June 6, 1907, were as follows:—

Five directors for 250 qualification shares apiece	1250 shares
Public	6777 shares
Underwriters	27,000 shares
Total . .	35,027 shares

and on June 6, 1907, the directors went to allotment. It was admitted for the purposes of this case that the application money of 1*s.* a share was duly paid by the underwriters, the public, and one director before allotment.

The other four directors handed in their applications for four blocks of 250 shares and four cheques of 12*l.* 10*s.* each for the application money on June 6, 1907, but for some unexplained reason the secretary did not pay these cheques into the company's bank till June 10, 1907, when they were cleared in due course and duly honoured.

On June 6, 1907, the company obtained a certificate authorizing it to commence business.

On September 10, 1907, the statutory meeting was held and adjourned to September 24, 1907.

On September 24, 1907, Anstis, a member of the public who had applied for and been allotted 250 shares and paid instalments of 162*l.* 10*s.*, served the following notice, dated September 21, on the company: "I beg to inform you that I hereby avoid the allotment of 250 shares in the above company made to me in June last. I have accordingly to request your directors forthwith to remove my name from the register of members in respect of the said shares, and to repay me the amount paid by me in respect thereof, viz." (stating the instalments) "Total 162*l.* 10*s.* In the event of your board failing to comply with this demand, I shall at once instruct my solicitors to take proceedings."

On October 3, 1907, McLean served a similar notice, dated

SWINFEN EADY J.
1908
NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.*
ANSTIS' AND MCLEAN'S CLAIMS.

October 2, 1907, avoiding an allotment of fifty shares which had been paid up in full on allotment.

On September 25, 1907, and October 10, 1907, special resolutions for a voluntary winding-up were passed.

On October 30, 1907, a supervision order was made and a liquidator appointed.

On November 22, 1907, this summons was issued by Anstis and McLean for an order that the register of members of the company might be rectified by removing the names of the applicants as the holders of 250 and 50 shares respectively therefrom on the ground that the allotments made to the applicants and all allotments made by the company were made in contravention of the provisions of s. 4 of the Companies Act, 1900, and that the liquidator might be ordered to repay out of the assets of the company 162*l.* 10*s.* to Anstis and 50*l.* to McLean (such sums being the amounts paid by the applicants respectively in respect of such shares), with interest on the respective sums at 5 per cent. from the date of payment.

Hon. E. C. Macnaghten, K.C., and *Manning*, for the applicants. The four directors' cheques not having been cleared before allotment, the application money for the minimum subscription was not in fact "paid to and received by the company" before allotment as required by s. 4, sub-s. 1, of the Companies Act, 1900. This is clear from the judgments in *Mears* v. *Western Canada Pulp and Paper Co.* (1), though in that case the point did not really arise, as the cheques in question were not paid on presentation.

In the Scottish case of *Glasgow Pavilion, Ld.* v. *Motherwell* (2) the cheques which were received after banking hours were cleared as soon as possible, so that, even if that case is any authority in England, after the judgments in *Mears* v. *Western Canada Pulp and Paper Co.* (1) it does not cover a case like the present, where the cheques were held over for four days without any conceivable reason.

The applicants were therefore entitled to avoid their allotments under s. 5, sub-s. 1, "within one month after the holding

(1) [1905] 2 Ch. 353.

(2) 6 F. 116.

of the statutory meeting of the company . . . . notwithstanding that the company is in course of being wound up." They gave due notice of avoidance within the month and commenced proceedings in due course. The section does not require proceedings to be commenced within the month.

Fischer Williams, for the liquidator. Payment by cheque which is duly honoured is payment to and receipt by the company within the Act. That point is expressly decided in *Glasgow Pavilion, Ld.* v. *Motherwell* (1), in reliance (inter alia) on *Spargo's Case*. (2) It does not, of course, bind the English Court, but there is a little inconvenience in construing a mercantile Act differently on different sides of the Tweed. In *Mears* v. *Western Canada Pulp and Paper Co.* (3) Vaughan Williams L.J. said, "I do not think that in the present decision we are deciding anything contrary to that which the Scottish Court held."

No doubt, as pointed out by Cozens-Hardy L.J., no difficulty would arise if companies postponed their allotment till the cheques were cleared. But none of the Lords Justices purported to overrule the Scottish case or held that this counsel of perfection was a sine qua non for a valid allotment. If a creditor accepts payment by cheque, then both in the legal and mercantile sense the cheque is a good immediate payment subject only to defeasance on dishonour: *Belshaw* v. *Bush*. (4) A payment in actual cash is very seldom required either in law or practice. There is no magic in the clearing of a cheque. No cash passes. There is merely a substitution of one form of credit for another. Instead of what is ex hypothesi a good cheque, the company gets a ledger credit at its bank. Can it be said that if the company's bank applied for shares their cheque or draft would not be payment, but their credit entry would be payment within the Act?

Of course, if the cheque is held over by arrangement with the drawer, that is not payment in præsenti any more than a three months bill would be; but that is not the case here. The cheques were handed in on Thursday, June 6, and by some slip on the part of the secretary they were not paid into the bank till the following Monday. He probably was well aware of the financial

(1) 6 F. 116.
(2) (1873) L. R. 8 Ch. 407, 411.
(3) [1905] 2 Ch. 353.
(4) (1851) 11 C. B. 191.

SWINFEN EADY J.
1908
NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED. *In re.* ANSTIS' AND MCLEAN'S CLAIMS.

stability of the directors and treated their cheques as equivalent to cash, as the event proved. But, assuming he was technically wrong, is this technical slip to render the entire allotment voidable?

Assuming, however, that the allotment was voidable, has it been effectively avoided? The notices specify no grounds for avoidance, and the summons was not issued until November 22, 1907, more than a month after the statutory meeting. This was too late.

Sect. 5 points to some effective repudiation by legal proceedings or by assent of the directors within the month. A repudiation by letter not assented to or acted on by the directors is insufficient. Applicants could repudiate for misrepresentation under the old law. Sect. 5 enlarges the grounds of repudiation and makes a winding-up no bar, but repudiation under s. 5 must be within a month of the statutory meeting. Now the old law is still in point on the question of what constitutes repudiation. When it was necessary to repudiate before the winding-up, it was held that a letter of repudiation not followed up by legal proceedings till after the winding-up was insufficient: *In re Scottish Petroleum Co.* (1)

[SWINFEN EADY J. That was on the ground that the rights of the creditors had intervened before any legal proceedings were taken. It does not apply to repudiation under s. 5, which may be after the winding-up. The intervention of the creditors' rights makes no difference. It is merely a question of repudiating within a definite time, and there is nothing in s. 5 to require actual proceedings within that time. The old cases are not really analogous.]

The ground of decision was no doubt different, but do they not in effect shew that a repudiation by letter is a nullity until it is assented to or enforced by legal proceedings?

Sect. 5 says that the allotment "shall be voidable at the instance of the applicant within one month after . . . . the statutory meeting of the company and not later." If this does not mean an effective avoidance by assent of the directors or legal proceedings within that period, it will be necessary in every similar

(1) (1883) 23 Ch. D 413, 434, 436, 439

case to consider whether the letter or other intimation of repudiation within the month was a sufficient avoidance, and whether the subsequent legal proceedings were taken within a reasonable time after the month had expired. A construction giving rise to such inconvenience and uncertainty should, if possible, be avoided.

SWINFEN EADY J. (after stating the facts). The question is whether it can be said that the sum represented by the four cheques in question was paid to and received by the company at the date of allotment. I have no information as to why these cheques were held over. In the case of the other applications the cheques were paid into the bank and cleared before allotment, and I have no information as to why these particular cheques for the application money for directors' qualification shares were kept back. It is contended that these cheques, being all ultimately honoured, must be treated as payment at the date of allotment. If that is so, I can see no reason why cheques should not be held over for a fortnight or three weeks. There is no reason why the line should be drawn at any particular period. An applicant for shares might ask to have his cheque held over for a fortnight; could it then be said that, if ultimately honoured, it was payment in cash? If a cheque held over on such an arrangement or understanding is payment in cash, I see no reason why a bill at six months should not be payment in cash. It is not an ordinary mercantile business transaction to retain a cheque several days before paying it into the bank.

In my opinion the present case is governed by the judgments of the Court of Appeal in *Mears* v. *Western Canada Pulp and Paper Co.* (1) Cozens-Hardy L.J., looking at the matter not on technical grounds but on grounds of substance, says (2): "I think the Legislature meant, in s. 4, that no allotment should be made until the company had actually received, in the ordinary mercantile business sense, the amount of the allotment money," i.e., application money. "No difficulty will arise from a business point of view if companies will but wait and postpone their allotment until the cheques which they have received have been

(1) [1905] 2 Ch. 353. (2) [1905] 2 Ch. 360.

SWINFEN EADY J.
1908
NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.* ANSTIS' AND MCLEAN'S CLAIMS.

cleared in the ordinary way." This quite negatives the possibility of treating the transaction in the present case as payment, seeing that the cheques were held over for four days.

The facts in *Glasgow Pavilion, Ld.* v. *Motherwell* (1) were quite different from the present facts. In that case the Inner House proceeded upon the footing that the cheques which were received after banking hours were cleared the next morning as soon as the drawers' banks were opened. In the present case they were held over for several days, a transaction quite out of the course of ordinary mercantile business. The money cannot therefore be treated as paid to and received by the company at the date of allotment. There has therefore been a contravention of s. 4, and the allotment is voidable at the instance of the allottees.

The question then arises whether the applicants have sufficiently repudiated their allotments within s. 5. The statutory meeting was held on September 10 and adjourned to September 24, 1907. The notices of repudiation were served on September 24 and October 3, 1907. [His Lordship read Anstis' notice.] It does not appear whether the board considered these notices or whether any answers were sent. The company went into liquidation almost immediately, namely, on October 10, and on October 30, 1907, a supervision order was made. On November 22, 1907, the applicants issued this summons.

In these circumstances I have come to the conclusion that the notices of repudiation were duly served within one month after the holding of the statutory meeting and followed up promptly by the institution of legal proceedings. Under the old law it was generally necessary to commence proceedings before the commencement of the winding-up. But s. 5 expressly says that an allotment in contravention of s. 4 "shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up." The winding-up, therefore, does not preclude the avoidance of the allotment. The applicants were not bound to institute legal proceedings immediately or within the month. They were entitled to wait a reasonable

(1) 6 F. 116.

time for the decision of the board before taking proceedings. After the winding-up they followed up their notices by taking proceedings with reasonable promptitude. They are entitled to the removal of their names from the register and to the return of the money they have paid with 5 per cent. interest from the date of payment.

Solicitors: *Blair & W. B. Girling; Peters & Bolton.*

G. R. A.

In re MOSES.

MOSES *v.* VALENTINE.

[1908 M. 616.]

Conflict of Laws—English Will—Residuary Gift—Life Tenant and Remainderman—Transvaal Leaseholds—Enjoyment in Specie—Roman-Dutch Law.

A testator domiciled in England made an English will by which he gave, devised, and bequeathed all his real and personal estate, both in England and South Africa, to his wife for her widowhood, with remainders over.

The property included long leaseholds in the Transvaal, where the Roman-Dutch law prevails:—

Held, that the Roman-Dutch law (as stated in an uncontested opinion of an ex-Chief Justice of the Transvaal) was applicable to the Transvaal leaseholds, and the widow was consequently entitled to enjoy them in specie.

Freke v. *Lord Carbery*, (1873) L. R. 16 Eq. 461; and *In the Goods of Gentili*, (1875) Ir. R. 9 Eq. 541, applied.

ORIGINATING SUMMONS.

By an English will dated January 25, 1904, a testator domiciled in England, after appointing his wife, Valentine, and Romain executors, gave, devised, and bequeathed all his real and personal estate, both in England and South Africa, to his wife for her widowhood, with remainders over. The testator died on October 21, 1904.

His will was proved in England in December, 1904, and in February, 1907, the executors took out letters of administration in South Africa. Part of the testator's estate consisting of long

SWINFEN EADY J.
1908
MOSES, *In re.*
MOSES v. VALENTINE.

leaseholds in the Transvaal, the question arose whether they ought to be converted according to the rule in *Howe* v. *Earl of Dartmouth* (1), or whether the widow was entitled to the income in specie.

The opinion of Advocate Gregorowski, formerly Chief Justice of the South African Republic, was taken in the matter by the present plaintiffs, two of the adult remaindermen, with a view to possible proceedings in the Transvaal Court. He advised (inter alia) as follows :—

"It is not necessary to discuss the usage of the Chancery Court in England. The leading case is *Howe* v. *Earl of Dartmouth* (1), which has been since followed—*Pickering* v. *Pickering*. (2) It is also the practice of the Court to evenly adjust the rights of the tenant for life and the remaindermen by apportioning the estate so that what is income going to the tenant for life and what is capital devolving on the remaindermen is neatly and accurately balanced : *In re Pitcairn* (3) ; *In re Hubbuck*. (4) . . . . Questions of this kind do not usually arise in our Courts because wills are couched in different language, and estates are usually disposed of in a different way to what they are in England. The estate is not entailed as a whole, but only as regards specific portions, usually the land. When there is a usufruct of farm stock or the like, the intention clearly appears not to convert, but that the usufructuary shall enjoy the specific property and hand it over on his death. For this he gives security.

"There are thus no decisions on apportionment between income and capital, nor are there decisions as to wasting or depreciating assets, such as leaseholds running out, as affecting the respective rights of life tenants and remaindermen. These are modern considerations unknown to the exigencies of either the Roman or the Roman-Dutch Law (vide 'Quasi-usufruct of things consumed' by use, Voet 7, 5, 3).

"The idea of conversion of perishable assets into permanent investment does not occur in the authorities except in the form of security to return the articles as they are impaired by use.

(1) (1802) 7 Ves. 137a; 1 W. & T. L. C. 7th ed. p. 68.
(2) (1839) 4 My. & Cr. 289.
(3) [1896] 2 Ch. 199.
(4) [1896] 1 Ch. 754.

The usufructuary was not bound to restore the value except in the case of fungibles consumed by use.

"When a usufruct is left of the estate, as in the present case, the practice is to leave the estate as it is after payment of debts, and the sale and distribution only takes place after the death of the usufructuary, when it becomes necessary to divide."

He also advised that the plaintiffs could not initiate proceedings in the Transvaal Court unless the executors did something which the plaintiffs considered detrimental to their interests. They must wait until the executors proceeded to sell; then both the usufructuary and the residuaries could intervene to prevent the sale. The matter could not be brought before the Court by petition. The proceedings would have to be by action. If the executors were to advertise the property, an interdict could be obtained, and then action could be instituted for a declaration of rights. The executors must proceed to do something. They must either hand over the properties to the widow to enjoy as usufructuary, or else they must convert them by sale. If they did the latter, the dispute would have assumed the form in which it could be dealt with. The widow could then claim to enjoy her usufruct specifically, or the heirs could also join in the action, which the parties could agree to frame as a special case. Another alternative was for the English Court to state a case for the opinion of the Transvaal Court, but the former method of raising the question was preferable. The plaintiffs could take no steps until the executors had done something to which the plaintiffs objected. There was no machinery, as in England, for getting an opinion from the Court. A dispute must have taken concrete form before the Court could be approached.

The widow, the executor Valentine, and the adult remaindermen were all opposed to a sale.

The executor Romain was perfectly neutral, but, having regard to the interests of the infant remaindermen, he was not willing to retain the leaseholds indefinitely without the sanction of the Court.

It was not considered desirable to incur the expense of proceedings by attempted sale and interdict, or special case in the

SWINFEN EADY J.
1908
MOSES, *In re.*
MOSES *v.* VALENTINE.

Transvaal. This summons was therefore issued by the plaintiffs, two of the adult remaindermen, against the executors and the other remaindermen to determine (inter alia)—(*a*) whether any and what part of the rents, profits, and income of such part of the testator's estate as consisted of securities not authorized by law for the investment of trust funds should be treated as capital or otherwise apportioned as between the parties successively interested in the testator's estate, and how and as from what date; (*b*) what steps, if any, the executors ought to take with regard to the getting in, conversion, and sale of the Transvaal leaseholds.

Ward Coldridge, for the plaintiffs. The leaseholds being immovables, the rights of the parties are governed by the Transvaal law: *Freke* v. *Lord Carbery* (1); *In the Goods of Gentili* (2); *Duncan* v. *Lawson* (3); *Pepin* v. *Bruyère*. (4) In *In re Piercy* (5) there was a trust for sale of Sardinian land, and it was held that until sale the rents devolved according to Italian law. The widow is therefore entitled to the rents of the leaseholds in specie.

Mossop, for the widow, the executor Valentine, and the other adult remaindermen, adopted the same argument.

Hodge, for the infant remaindermen. So far as any question of substantive law arises I cannot dispute that the Transvaal law applies. But the present question really turns on the construction of the will. The testator clearly intended the whole residuary estate, including the Transvaal leaseholds, to be enjoyed in succession. Owing to the Transvaal law the executors may be unable to convert the leaseholds, but the testator's intention might be carried out by valuing the leaseholds and paying 4 per cent. on the valuation to the life tenant. This was done in *Gibson* v. *Bott* (6), a case of unsaleable English leaseholds, where no conflict of law arose. The parties are all before the Court, and some such order might possibly be made to bind them personally in order to carry out the testator's intention,

(1) L. R. 16 Eq. 461.
(2) Ir. R. 9 Eq. 541.
(3) (1889) 41 Ch. D. 394.
(4) [1902] 1 Ch. 24, 26.
(5) [1895] 1 Ch. 83.
(6) (1802) 7 Ves. 89.

unless that intention is itself obnoxious to the Transvaal law.

Israel, for the executor Romain.

SWINFEN EADY J. In *Freke* v. *Lord Carbery* (1) Lord Selborne L.C. decided that the validity of a testamentary disposition of an English leasehold was governed by the law of England, i.e., the lex loci rei sitæ, and not by the law of the testator's domicil. The same principle was applied in *In the Goods of Gentili* (2), and the same principle is applicable here.

The testator, domiciled in England, has devised and bequeathed all his real and personal estate, which includes long leaseholds in the Transvaal, to his wife for her widowhood, with remainders over. The Roman-Dutch law is applicable to the Transvaal leaseholds.

It appears from Advocate Gregorowski's opinion that the usufructuary is entitled to enjoy the rents of the leaseholds in specie, and that if the executors were to attempt to realize them the usufructuary or residuaries could obtain an interdict. It also appears that the usufructuary of immovables is entitled to enjoy them in specie without giving security that they shall be of the same value at the end of his term, the practice of giving security being confined to the case of res fungibiles quæ ipso usu consumuntur. The widow is therefore entitled to enjoy the leaseholds in specie during her widowhood.

Solicitors: *Upton & Britton; David A. Romain.*

(1) L. R. 16 Eq. 461. (2) Ir. R. 9 Eq. 541.

G. R. A.

NEVILLE J.

1908

May 11.

BURTON *v.* BEVAN.

[1907 B. 1445.]

Company—Proceeding to Allotment—Proportion of Shares applied for—Application Money not paid—Liability of Directors—"Knowingly contravene"—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 5.

A company issued a prospectus offering 20,000 1*l.* preference shares to the public and stating that no allotment would be made unless 15,000 shares had been applied for and the application money paid. The plaintiff applied for 100 shares. The directors proceeded to allotment when 15,000 shares had been applied for, but in some cases the application money had only been paid by cheques which had not been cleared. The plaintiff paid the full amount of his shares. The company went into liquidation, and it then appeared that the company was insolvent and the shares worthless. The plaintiff brought this action against one of the directors claiming repayment of the money paid on application for the shares under s. 4 and compensation for loss under s. 5 of the Companies Act, 1900. The defendant was not present at the meeting of the board at which the allotment was made, but was present at subsequent meetings at which the minutes were confirmed and a resolution passed to apply for a certificate to commence business:—

Held that, *Mears* v. *Western Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, having decided that payment by cheque is not payment within s. 4 of the Companies Act, 1900, until the cheque is cleared, there had been a contravention of the Act.

Sect. 4 applies only before allotment. After allotment is once made, whether in contravention of the Act or not, it is only voidable at the option of the shareholder, and the company cannot pay back the application money; the only liability of the directors after allotment is the liability to make good the loss under s. 5, sub-s. 2, of the Act. Under that section, "knowingly contravene" means contravene with knowledge of the facts. A director cannot escape liability by ignorance of the law.

But a director does not make himself responsible for an act done at a meeting at which he was not present, and which is complete without further confirmation, merely by voting at a subsequent meeting for the confirmation of the minutes.

Held, also, on all the evidence, that the defendant was not aware of the facts and had not knowingly contravened the Act.

John Esson & Son, Limited, was a company incorporated in April, 1905, with a capital of 50,000*l.* divided into 20,000 cumulative preference shares and 30,000 ordinary shares of 1*l.*

each. On April 6, 1905, the company issued a prospectus to the public inviting subscription for the whole 20,000 preference shares upon terms which made 2*s.* 6*d.* per share payable on application and the rest in instalments to be completed two months after allotment. The prospectus set out art. 7 of the company's articles of association, which provided, "The board shall not proceed to the allotment of, and no allotment shall be made of, any share capital of the company offered to the public for subscription, unless at least 15,000 of the preference shares offered to the public for subscription have been subscribed, and the moneys payable on application therefor have been paid to and received by the company." The plaintiff applied for 100 preference shares. This prospectus only produced applications from the public for 7240 shares. The directors arranged that certain other shares applied for by the signatories of the memorandum and others, including 250 shares which the defendant had applied for in order to qualify for becoming a director of the company, should be treated as part of the shares offered to the public by the prospectus. The number of shares applied for was thus brought up to 15,023. The arrangement was obviously improper, but it did not come into discussion in this action. Of these 15,023 shares there were 1172, including the 250 applied for by the defendant, on which no money had been paid in cash on application. Cheques had been given for the moneys payable on application for some of these shares, with directions that they should be held over and not presented at once. It was alleged that the defendant had given a cheque, with these directions, for the application moneys on shares applied for by him, but the judge held on the evidence that no such cheque had been given.

On April 17, 1905, the directors, notwithstanding the absence of payment of the application moneys on these shares, proceeded to allotment, and allotted the 15,023 shares, including the 100 applied for by the plaintiff. The plaintiff duly paid all the instalments on these shares. Early in 1907 the company went into voluntary liquidation, and it was then found that the company was insolvent and the shares worthless. On April 15, 1907, the plaintiff brought this action against the defendant, alleging that the defendant, as one of the directors of the company, had

NEVILLE J. 1908 BURTON v. BEVAN.

knowingly contravened the provisions of the Act of 1900 with respect to allotment, and claiming repayment of his application money and payment of the full amount paid on his shares. The defence was that the defendant had nothing to do with the allotment. He was not present at the meeting of the board on April 17, when the arrangements above mentioned were carried out and the allotment made, but he was present at a meeting on April 6, when the issue of the prospectus was authorized, at a meeting on May 9, when a resolution was passed to apply for a certificate to commence business, and at a meeting on May 22, when the minutes of the three previous meetings were read and confirmed. The defendant had been induced to become a director by representations that the company would purchase a business in which he was interested, and Messrs. Esson & Son, the firm whose business the company was formed to acquire, had agreed to find his qualification. He had therefore signed the application for 250 shares, but had not paid the application money, leaving Messrs. Esson & Son to provide it. There was some evidence that the defendant and the other directors had at the meeting on April 6 given cheques to the company for the application money on shares applied for by them, but directed the cheques to be held over. The judge, however, held that the defendant had not signed such a cheque. The defendant actually paid the application and allotment money on July 3, 1905, and the balance of the shares on July 10, 1905. He resigned his directorship on August 11, 1905, and his resignation was accepted on September 1, 1905, fifteen months before the winding-up.

The questions in the action turned on ss. 4 and 5 of the Companies Act, 1900 (63 & 64 Vict. c. 48). (1)

Peterson, K.C., and *Cozens-Hardy*, for the plaintiff. Payment of application money under s. 4 (1) of the Companies Act, 1900, means payment in cash. Money paid by cheque is not paid to

(1) Sect. 4: "(1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely—

"(*a*) the amount (if any) fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the

and received by the company until the cheque is cleared: *Mears v. Western Canada Pulp and Paper Co.* (1) The application money was therefore not paid at the date of allotment on all the 15,000 shares, and the company ought, under s. 4, sub-s. 4, of the Act of 1900, at the expiration of forty days to have paid back what they had received. They did not do so, and the section

---

directors may proceed to allotment; or

"(*b*) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

"(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

"(3.) The amount payable on application on each share shall not be less than five per cent. of the nominal amount of the share.

"(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to the applicants without interest, and if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per cent. per annum from the expiration of the forty-eight days: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

"(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

"(6.) This section, except subsection (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription."

Sect. 5: "(1.) An allotment made by a company to an applicant in contravention of the foregoing provisions of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

"(2.) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the foregoing provisions of this Act with respect to allotment he shall be liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby: Provided that proceedings to recover such loss, damages, or costs shall not be commenced after the expiration of two years from the date of the allotment."

(1) [1905] 2 Ch. 353.

NEVILLE J. 1908 BURTON v. BEVAN.

makes the directors jointly and severally liable to repay that money with interest. Under s. 5, sub-s. 2, the wider liability of making good all loss to the company or the allottee is imposed on directors who "knowingly contravene or permit or authorise the contravention" of any of the foregoing provisions of the Act. In this case the defendant must have known that the application money was not all paid, for that on his own shares was not paid. "Knowingly" must mean with knowledge of the facts, not with knowledge that he is contravening. That is established by the cases under s. 38 of the Companies Act, 1867: *Twycross* v. *Grant* (1); *Cackett* v. *Keswick*. (2) Here there was a contravention in allotting the shares at all, and another in not paying back the money. The defendant had full knowledge of the facts. He cannot escape because he was ignorant of the law.

Jenkins, K.C., and *Ashton Cross*, for the defendant. The plaintiff's case must depend wholly on s. 5, sub-s. 2, of the Companies Act, 1900. Sect. 4, sub-s. 4, has nothing to do with it. That can only apply before allotment. If a sufficient number of shares is not applied for the money is to be returned and the directors are made liable. But the proviso, that a director shall not be liable if he proves that the "loss of the money" was not due to his misconduct or negligence, shews that there must have been a loss of the money. After an allotment, whether valid or invalid, the company could not return the money. The allotment is made voidable by the applicant within a certain time, and unless it is so avoided the company cannot avoid the allotment or pay back the money. The only liability of the defendant is under s. 4, sub-s. 4, if he has knowingly contravened or authorized the contravention of these provisions. The evidence shews that he had nothing to do with the allotment and that he knew nothing about the facts. The fact that he was present at a subsequent meeting at which the minutes were confirmed does not amount to authorizing what was done: *In re Lands Allotment Co.* (3) The allotment had then been made, and it did not need confirmation.

Peterson, K.C., in reply.

(1) (1877) 2 C. P. D. 469. (2) [1902] 2 Ch. 456.
(3) [1894] 1 Ch. 616, 634.

NEVILLE J. 1908

BURTON v. BEVAN.

NEVILLE J. In this case a shareholder in a company has brought an action against a director, seeking to make him liable under the Act of 1900 on the ground that at the time when the directors went to allotment the whole of the application money for the shares had not been paid. Having regard to the decision that the giving of a cheque for the application money is not a payment within the meaning of the statute, but that the cheque must be cleared before the payment thereby required is complete, I think it is clear there was at the time of the allotment a contravention of s. 4 of the Act of 1900. The company was ultimately wound up, and before the expiration of the two years, the limit of time for commencing proceedings imposed by s. 5, the present plaintiff brought his action against one of the directors. Why he was selected I do not know. The question is whether upon the true construction of s. 4 and s. 5 the plaintiff under these circumstances is entitled to recover. It seems to me that the two sections have a meaning which can be understood if they are taken together. Sect. 4 commences with a prohibition against an allotment of shares unless certain conditions are fulfilled. Those conditions are set out in sub-ss. 1, 2, and 3. Then the section goes further and says, in effect, not only shall there be a prohibition against allotment, but the company must return the money paid by subscribers unless within forty days the conditions provided for have been complied with, and the directors are made jointly and severally liable to repay the money paid by the subscribers under sub-s. 4. Then comes s. 5, which says this: "An allotment made by a company to an applicant in contravention of the foregoing provisions of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up." I think it follows from that that, if the directors have gone to allotment in contravention of the prohibition imposed upon them by the earlier sub-sections of s. 4, a contract is created between the company and the subscribers; otherwise the first sub-section of s. 5 is unintelligible, because it makes the allotment voidable, not at the instance of either the company

NEVILLE J. 1908 BURTON v. BEVAN.

or the applicant, but only at the instance of the applicant, and voidable only within a certain time. The time seems to me to be fixed with the idea that the shareholder at the first general meeting of the company will be enabled, if he chooses, to find out what the position of affairs was at the time when the allotment was made. Consequently, if he is suspicious or dissatisfied, he then has an opportunity of ascertaining how things stand, and he is then given one month after that in which to elect whether he will adhere to his contract with the company and take shares or whether he will void the contract. It seems to me, therefore, that the directors cannot return the money under s. 4 where they have proceeded to allotment, because the choice of voiding the contract is not left to them, it is left to the applicants themselves. If the directors attempted to return the money which they have received the applicants would have a perfect right to say "No, we are the shareholders in the company; notwithstanding the objection to the allotment we are prepared to go on with the matter." The directors are made liable, under sub-s. 4 of s. 4, in cases where, the prohibition having come into force—that is to say, the conditions not having been fulfilled—the positive obligation imposed upon the company in that event of returning the money has not been fulfilled. I think that sub-s. 4 can only apply to cases where no allotment has been made in contravention of the statute. If an allotment has been made in contravention of the statute, I think that s. 5 comes into force, and under that section not only is the applicant entitled to void his contract, but if he suffers any loss in consequence of it he is entitled to bring his action against the directors or any director of the company who knowingly contravenes or permits or authorizes the contravention of any of the foregoing provisions of the Act with respect to allotment. That right of the subscriber is subject to a special limitation of time imposed by the section; he is to bring his action within two years from the time of allotment.

That being so, I have to consider whether the present defendant knowingly contravened or permitted or authorized the contravention of the provisions of s. 4. The provisions of s. 4, on the facts as I understand them, were contravened inasmuch

as the directors proceeded to allotment when the conditions imposed by the earlier part of the section were not fulfilled. Is the defendant under the obligation imposed by sub-s. 2 of s. 5? I think that "knowingly" means with knowledge of the facts upon which contravention depends. I think it is immaterial whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is, Did he know the facts which made the act complained of a contravention of the statute? In the present case I do not think that the defendant Bevan himself either knowingly contravened or permitted or authorized any contravention on the part of the directors who went to allotment. He was not present at the meeting at which the shares were allotted, nor do I think that he had any notice or knowledge of the fact that the directors were going to proceed to allotment at that meeting; and even had he had such knowledge, I do not think that he knew of the facts that rendered that allotment a contravention of the provisions of s. 4. It is said that he had given a cheque for 125*l.* in respect of 250 shares which he had contracted to take from the company as his director's qualification, and there is a letter which points to the existence of a cheque for 125*l.* being in the possession of the company, given by him. I have heard Mr. Bevan's evidence, and I am by no means satisfied that he did give such a cheque. What the explanation of the letter may be I do not know. But we do know that at this time Bevan was under the impression that his qualification was going to be found for him by the vendors, and he tells us, and I accept his statement, that he did suppose that the proper payments on account of his shares had been made, and that he himself has not the smallest recollection of ever having made them, but he supposed they had been made by the persons who had contracted to give him his qualification. He attended at the later meeting at which the minutes of the meeting when the allotment was made were read and confirmed. I do not think that confirmation would amount to a contravention of the Act on his part, even if he had at that date known that the whole of the application money had not been paid. I say so because, from the construction I have put on the Act, the action of the

NEVILLE J. 1908 BURTON v. BEVAN.

directors was no longer open to revocation, but was complete and final, so far as the company was concerned, upon the resolution for allotment which was come to at the previous meeting. Further, assuming the confirmation of previous allotment at the meeting of April 17 to be a contravention of the Act in itself, I do not think that Bevan then knew of the existence of the circumstances which made the allotment a contravention of the provisions of s. 4. I think, therefore, that the defendant does not come under the liability imposed upon the directors under s. 4 or s. 5, and that the action must be dismissed with costs.

Solicitors: *Baker, Baker & Co.; Jennings, Son & Allen.*

J. R. B.

NEVILLE J. 1908 *May* 16.

In re BURKE. BURKE *v.* BURKE.

[1908 B. 963.]

Trustee—Investment expressly forbidden—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 1.

A direction to keep trust funds and invest them in one particular way does not "expressly forbid" investment in any of the investments authorized by the Trustee Act, 1893.

WALTER BURKE by his will dated March 24, 1907, gave his wife the use of the house in which he resided during her life and a sum of 4*l.* a week so long as his business should be carried on, and afterwards the income of his whole estate during her life; and he directed his trustees to carry on his ironstone mine business until the ironstone should be worked out or become unsaleable at a profit, and to employ therein such of the capital of his estate as should be necessary, and after giving directions for carrying on the said business he directed that the balance of profits made and not required to be used in carrying on his said business should be paid into a deposit account at the London City and Midland Bank, Grantham, and he directed his trustees immediately upon his decease to open a deposit account with the

said bank and pay therein the whole of his capital estate, after providing for payment of debts, funeral and testamentary expenses, and legacies, and proceeded: "Such residue capital estate and all the profits arising from my said business to be added thereto as hereinbefore directed and all other my estate whatsoever shall form and is hereinbefore and hereinafter referred to as 'my trust estate' My trustees shall keep my trust estate and invest the same by leaving the same on deposit with the said bank at such rate of interest as they may be able to obtain My trustees shall allow the income arising from my trust estate to accumulate except so far as it may be necessary for them to use the same for the weekly sum of 4*l.* payable to my wife during the continuance of my said business at the expiration of which period the said income will become payable to my wife as hereinbefore provided." He then disposed of his trust estate after his wife's death, and in the case of several shares which required investment he directed his trustees to invest the same at their discretion.

The testator died on March 27, 1907. His business was carried on by the trustees at a profit and the moneys paid into a deposit account as directed by the testator.

This summons was taken out by the trustees in March, 1908, for the determination of the question whether the testator's trust estate ought to be invested only on deposit account, as directed by the will, or the trustees had power to invest in any of the investments specified in s. 1 of the Trustee Act, 1893.

Bramwell Davis, K.C., and *G. D. Pepys*, for the plaintiffs. The words of the Act give the trustees power to invest in the specified securities unless they are expressly forbidden. There is no express forbidding in this case, and however clearly the testator's intention that the trustees are to be confined to particular investments may be inferred from his words, it is not enough: *In re Maire.* (1) *Hume* v. *Lopes* (2) shews that the Courts will not limit the operation of the Act. *Ovey* v. *Ovey* (3) only shews that the Court, as well as trustees, will be bound by an express prohibition.

(1) (1905) 49 Sol. J. 383. (2) [1892] A. C. 112.
(3) [1900] 2 Ch. 524.

NEVILLE J. 1908 BURKE, *In re.* BURKE *v.* BURKE.

Richard Nevill, for a beneficiary.

Peterson, K.C., and *Errington*, for other defendants. The intention of the testator that the trustees should keep all his moneys in deposit account at the bank is so clear that it amounts to a prohibition of any other investment. The words "keep and invest" are in effect an express prohibition of any other way of dealing with the money and are sufficient to exclude the Act.

NEVILLE J. The words of the Act require not only a direction that the trustees shall invest in certain investments, but an express prohibition of any of the investments permitted by the Act which the testator wishes to exclude. I gladly follow the decision of Farwell J. in *In re Maire* (1) that the Act means what it says. It would in my opinion be wrong to introduce nice distinctions as to the application of the Act, because it was intended to give trustees a plain and safe guide. No doubt a very strong case may be made out that these investments are inferentially forbidden by the will before me, but they are not expressly forbidden. The question must be answered by saying that the trustees have power to invest any part of the testator's residuary estate in any investments authorized by the Trustee Act, 1893.

Solicitors: *L. E. Townroe, for Theo. Norton, Grantham; Royds, Rawstorne & Co.*

(1) 49 Sol. J. 383.

J. R. B.

Explained. *In re* FREELAND [1952] 1 Ch. 110

In re STEWART.

STEWART *v.* McLAUGHLIN.

NEVILLE J.

1908

May 21, 28.

[1907 S. 4212.]

Administration—Imperfect Gift of Personalty—Bonds to Bearer—Continuing Intention to give—Donee appointed one of the Executors.

The principle laid down by Jessel M.R. in *Strong* v. *Bird*, (1874) L. R. 18 Eq. 315—that where a testator has expressed in his lifetime an intention to give personal estate belonging to him to one who becomes his executor, the intention to give continuing, the donee is entitled to hold the property for his own benefit—is not confined to the release of a debt; and it is immaterial whether the donee is the only executor or one of several.

ACTION.

The plaintiff was the widow and one of the executors of her late husband, Dr. James Stewart, deceased, who left a will and two codicils made some years before his death. The four defendants were the other executors of the testator, who proved the will and codicils in July, 1906; and probate of the same was also granted to the plaintiff in May, 1907. By the second codicil the testator gave (inter alia) all moneys standing to his credit at the London and County Bank at Rickmansworth to the plaintiff absolutely. The residue of his estate went to charities. A few days before his death the testator, through his brokers, purchased and paid for three bonds to bearer for 500*l.* each, but the bonds were not delivered by the brokers to the defendants until after the testator's death. The action was brought to determine whether, in the circumstances stated below, the plaintiff was entitled to the three bonds as well as to the whole of the bank balance at Rickmansworth.

The following statement of facts is taken from the judgment:—

The testator in October, 1905, being then about to go abroad with his wife, presented her with a considerable number of bonds payable to bearer, to the value of over 16,000*l.* At that time, or at some other time during the year 1905, a list of these

NEVILLE J.

1908

STEWART, *In re.* STEWART *v.* MCLAUGHLIN.

bonds was entered by the testator in a book under the heading "Mrs. Stewart's capital account." Either at the same time or in the same year he added in pencil, at the foot of the list, "Coming in next year 1000*l.*," and added this sum to the amount of the bonds already enumerated, making a total of 17,230*l.* He made, apparently at the same time, a corresponding addition of 50*l.* to the income. One of these bonds (for 500*l.*) was drawn for payment on January 1, 1906, and after the return of Dr. Stewart and his wife to England in April, 1906, was paid off, Dr. Stewart receiving the amount and paying it into his own banking account at Rickmansworth. Shortly afterwards, in May, 1906, Dr. Stewart wrote to his brokers instructing them to purchase three 500*l.* Buenos Ayres Water Supply and Drainage Works bonds. His instructions were carried out, and a letter was received by him from his brokers advising him of the purchase and enclosing a bought note. Dr. Stewart paid for the bonds by a cheque for 1545*l.* drawn upon his account at another bank. Shortly before his death, which occurred suddenly on June 2, 1906, Dr. Stewart called his wife into the dining-room and told her that he had something to shew her that would interest her. He thereupon handed her an envelope containing the brokers' letter, announcing the purchase, and the bought note, at the same time saying to her, "I have bought these bonds for you." Dr. Stewart died without having done anything further to complete the transaction, the bonds not having been delivered by the brokers before his death, and the amount paid on the drawn bond still standing to the credit of his account at the bank at Rickmansworth.

Peterson, K.C., and *A. àB. Terrell*, for the plaintiff. On the evidence the testator intended to give the bonds to his wife, and that intention was perfected by the appointment of the plaintiff as executrix, which passed to her the legal estate, and she can therefore take the benefit of the imperfect gift: *Strong* v. *Bird* (1); *In re Griffin* (2); *In re Applebee*. (3) The case of *In re Hyslop* (4) may be cited against us, but there the intention of the testator

(1) L. R. 18 Eq. 315, 318.
(2) [1899] 1 Ch. 408.
(3) [1891] 3 Ch. 422.
(4) [1894] 3 Ch. 522.

to forego a debt was not communicated to the debtor, who was an executor, and was contained in a testamentary document not properly attested. As to the proceeds of the bond paid off, they pass to the plaintiff under the gift of the balance at the bank in the codicil.

Jenkins, K.C., and *G. Cartwright*, for the defendants. As to the bond paid off, the plaintiff cannot have the proceeds of it and also the substituted bond; that would be getting the amount of it twice over. As to the other two bonds, it is the case of an incomplete gift and is distinguishable from those cases where the appointment of a debtor as executor coupled with an intention to forgive the debt operates to release the debt. *In re Griffin* (1) was the case of a banker's deposit note, and the gift was held complete in the testator's lifetime, and the rest of the judgment that deals with *Strong* v. *Bird* (2) is only dictum. All the other cases cited are instances of the forgiveness of a debt and not of an imperfect gift. Moreover, in *Strong* v. *Bird* (2) the donee was the sole executor; but where there are several executors they take the testator's estate indivisibly among themselves: Williams on Executors, 10th ed. p. 684. Therefore one of several executors cannot set up an independent gift to himself as the plaintiff seeks to do here; it would unduly extend the principle laid down in *Strong* v. *Bird*. (2)

Peterson, K.C., in reply.

Cur. adv. vult.

May 28. NEVILLE J. In this case the plaintiff, Mrs. Stewart, one of the executors under her late husband's will, claims to be beneficially entitled to three bonds for 500*l*. each under the following circumstances. [His Lordship stated the facts, and continued:—] The plaintiff contends that under these circumstances she is entitled to the three bonds, the imperfect gift in the testator's lifetime having been perfected by her appointment as executrix, under the principle which it is contended was laid down in *Strong* v. *Bird*. (2) On the other hand it is argued that *Strong* v. *Bird* (2) only applies to the release of a debt, and not to a gift, and, moreover, that it does not apply in the case of a

(1) [1899] 1 Ch. 408. (2) L. R. 18 Eq. 315, 318.

NEVILLE J. 1908 STEWART, *In re.* STEWART *v.* MCLAUGHLIN.

gift where the donee is only one of several executors. It is further argued that the intention of the testator to make a gift of the three bonds to his wife was not proved, and that at all events she cannot be entitled to the three bonds and also to the proceeds of the bond paid off which passed to her under the gift in the codicil. I accept the plaintiff's account of her conversation with the testator about the bonds. He had in his hands 500*l.* or thereabouts, the proceeds of the bond paid off, which formed part of the provision he had in 1905 made for his wife. He had, I think, in his pencil note indicated his intention of adding to that provision in 1906 to the extent of 1000*l.* Under those circumstances he buys three 500*l.* bonds at a price slightly exceeding 1500*l.* Coupling this with the statement of the wife that he told her "I have bought these bonds for you," I have no doubt that he intended the bonds to be her property. The intention of the testator to give the bonds being thus, as I hold, proved, does the fact that the wife was appointed executrix give validity to what, unless it can be supported as a declaration of trust, would be an imperfect and invalid gift? I think it does, the case, in my opinion, being within the principle of *Strong* v. *Bird* (1), which is a decision of the late Sir George Jessel that has remained unchallenged for upwards of thirty years and has been followed in several cases. It purports to lay down a principle of general application, and I think I am bound to apply that principle to the present case. The decision is, as I understand it, to the following effect: that where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit. The reasoning by which the conclusion is reached is of a double character—first, that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime, and, secondly, that the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor. The whole of the property

(1) L. R. 18 Eq. 315, 318.

in the personal estate in the eye of the law vesting in each executor, it seems to me immaterial whether the donee is the only executor or one of several; nor do I think the rule is confined to cases of the release of a debt owing by the donee. The intention to give, however, must not be an intention of testamentary benefaction, although the intended donee is the executor, for in that case the rule cannot apply, the prescribed formalities for testamentary disposition not having been observed: see *Selwin* v. *Brown* (1); *In re Hyslop.* (2) The plaintiff admitted in her evidence that she understood the gift of the three bonds to be, as to one of them, in discharge of any obligation on the part of the testator as recipient of the proceeds of the bond paid off, and I have no doubt that this was the intention of the testator. Upon this view it was contended that the plaintiff must account to the estate for the proceeds of that bond, as otherwise she would get 2000*l.* instead of the 1500*l.* intended for her by the testator. The answer to this contention is, I think, that the gift by the codicil of the balance at the bank was wholly independent of the gift of the bonds. The plaintiff takes under the codicil whatever the balance at the bank happens to consist of at the date of death, without regard to the source from which it was derived. I think, therefore, that the plaintiff is entitled both to the three bonds and to the balance at the bank, and the defendants must pay her the costs of the action and counterclaim, taking these and their own costs out of the testator's estate.

Solicitors: *H. S. Knight Gregson; Roy & Cartwright.*

(1) (1735) 3 Bro. P. C. 607. (2) [1894] 3 Ch. 522.

H. L. F.

PARKER J.

1908

March 16, 17; *April* 6.

WHITE *v.* SUMMERS.

[1907 W. 525.]

Will—Construction—Contingent Remainder or Executory Devise.

A testator who died in 1847 devised real estate to B. for life and after his death to his sons successively in tail male, and in default of such issue to the eldest or other son of J. S. who should first attain or have attained the age of twenty-one years successively in tail male, and in default of such issue to F. S., the daughter of J. S., for life, and after her death to her first and other sons successively in tail male.

B. died in 1859. At that date no son of J. S. had attained twenty-one. J. S. entered into possession as guardian of his infant son, who entered into possession on attaining twenty-one, and was on his death in 1879 succeeded by his son, who retained possession until the commencement of this action. F. S. lived until March 1, 1906, and on her death her eldest surviving son brought this action claiming the estate:—

Held, that the limitation to the first son of J. S. who attained twenty-one was a contingent remainder, and failed because no such son had attained twenty-one before the determination of the particular estate which supported the remainder, and that the words "in default of such issue" were merely equivalent to "in remainder," and did not make the limitations subsequent to the devise to the sons of J. S. contingent upon J. S. having no sons who attained twenty-one. The plaintiff, therefore, was entitled to the estate.

The question whether a devise is to be construed as a contingent remainder or an executory devise is one of strict law and cannot be affected by the intention of the testator unless his words can be construed as expressing an intention to make alternative gifts, one as a contingent remainder and the other by way of executory devise.

In re Wrightson, [1904] 2 Ch. 95, explained.

William Bowen, by his will dated August 21, 1846, gave and devised all his messuages, lands, tenements, and hereditaments whatsoever and wheresoever to the use of his nephew John Bowen and his assigns during his life without impeachment of waste, and after his decease to the use of his first and other sons severally and successively according to their respective seniorities in tail male, and continued: "And in default of such issue to the use of the eldest or other son of the body of my nephew James Summers of the town and county of Haverfordwest

solicitor who shall first attain or have attained the age of twenty-one years lawfully issuing severally and successively according to their several and respective seniorities in tail male and in default of such issue To the use of Frances Hannah Eliza Summers (daughter of the said James Summers) and her assigns during her life without impeachment of waste and after her decease to the use of the first and every other son of the body of the said Frances Hannah Eliza Summers lawfully issuing severally and successively according to their several and respective seniorities in tail male and in default of such issue " to the uses therein mentioned.

The testator died on October 15, 1847, and his will, with a codicil not affecting the devise above set out, was duly proved on December 13, 1847.

The testator was at his death seised in fee of Milton House, which was the subject of this action. John Bowen entered into possession of the testator's real estate, including Milton House, and remained in possession during his life. He died on May 28, 1859, without ever having had any issue. At the date of the death of John Bowen no son of James Summers had attained the age of twenty-one years. James Summers entered into possession as guardian of his infant son James Bowen Summers, who attained twenty-one in the year 1869, and thereupon entered into possession of the estate and retained it until his death on April 22, 1879. On his death the defendant, who was his eldest son, entered into possession of the estate, which he retained until the commencement of this action. Frances Hannah Eliza Summers was living at the death of John Bowen, the tenant for life. She was married in 1872 to Raymond Wallace Esmonde White, and died on March 1, 1906, leaving her surviving the plaintiff her second and eldest surviving son, her eldest son having died in infancy.

The plaintiff commenced this action on February 20, 1907, claiming possession of Milton House on the ground that the limitation to the first son of James Summers who attained twenty-one was a contingent remainder, and therefore failed on the death of John Bowen before it became vested by a son of James attaining twenty-one.

PARKER J. 1908 WHITE v. SUMMERS.

Romer, K.C., P. S. Stokes, and *R. E. L. Vaughan Williams*, for the plaintiff. It is a settled rule of law, without any exception, that a gift which can take effect as a contingent remainder is never to be construed as an executory devise: Fearne on Contingent Remainders, 10th ed. vol. i., pp. 394, 526; Powell on Devises, 3rd ed. vol. ii. p. 237; Williams on Real Property, 20th ed. p. 370; *Hopkins* v. *Hopkins* (1); *Doe* v. *Morgan*. (2)

[*Upjohn, K.C.*, referred to Fearne on Contingent Remainders, 10th ed. vol. i. pp. 20, 22, and *Weale* v. *Lower*. (3)]

The limitation in the present case is within the fourth of the four classes into which Fearne divides contingent remainders, namely, that in which the person to whom the remainder is limited is not yet ascertained or not yet in being: 10th ed. p. 5. Further, on the failure of a contingent remainder the first vested estate in remainder takes effect as an interest in possession: *Goodright* v. *Cornish* (4); Williams on Real Property, 20th ed. p. 360. Applying these principles to the present case, the gift to the eldest or other son of James Summers who should first attain or have attained twenty-one is clearly a contingent remainder, for it was capable of taking effect as a remainder if James Summers had had a son who had attained twenty-one before the life estate of John Bowen determined, and the gift to John Bowen's sons failed. It is also clear that this remainder failed, since there was no son of James Summers who had attained twenty-one when the preceding estates determined. This being so, the limitation "in default of such issue" to the use of Frances Summers for life, with remainder to her sons in tail, gave her a vested estate for life and her sons vested estates tail in remainder: Powell on Devises, 3rd ed. vol. ii. p. 220; Jarman on Wills, 5th ed. vol. i. pp. 757, 758; *Doe* v. *Dacre* (5); *Lewis* v. *Waters* (6); *Goodright* v. *Jones* (7); *Ashley* v. *Ashley* (8); and the first of these vested remainders took effect on John Bowen's death. No doubt the Court has sometimes found on the face of the will an intention that there should be a "gap" between the determination

(1) (1734) Cas. t. Tal. 44; (1738) 1 Atk. 581; (1749) 1 Ves. Sen. 268.
(2) (1790) 3 T. R. 763.
(3) (1672) Pol. 54, 67.
(4) (1694) 1 Salk. 226.
(5) (1798) 1 Bos. & P. 250; 8 T. R. 112.
(6) (1805) 6 East, 336.
(7) (1815) 4 M. & S. 88.
(8) (1833) 6 Sim. 358.

of the preceding estate and the future estate, and has therefore construed the gift as an executory devise, because to do otherwise would be to strike out words which made it impossible for the gift to take effect as a remainder. This was the principle of the decisions in *In re Lechmere and Lloyd* (1), *Miles* v. *Jarvis* (2), and *Dean* v. *Dean*. (3) But these cases all depended on the gift being to persons who should attain twenty-one "before or after" the determination of the preceding estate, or similar words. There are no such words in the present case. It is like *Holmes* v. *Prescott* (4), where the absence of these words was held to be fatal to the contention that the gift was an executory devise. The words "in default of such issue" are the common form of limitation of a remainder after an estate tail: see, for example, Key and Elphinstone's Precedents, 8th ed. vol. ii. p. 599.

Upjohn, *K.C.*, *Buckmaster*, *K.C.*, and *Owen Thompson*, for the defendants. On the face of this will there is a clear expression of the testator's intention that, if his nephew John Bowen had no son, the first son of James Summers who attained twenty-one was to take an estate tail, and that none of the subsequently named persons should take the property unless no son of James Summers attained twenty-one. The ordinary rule based on *Purefoy* v. *Rogers* (5) may be that a limitation will if possible be construed as a contingent remainder; but a gift like that in question will be construed as an executory devise, though in a deed it might be void as a remainder, where it wants the connection with or relation to the preceding estate required to make it a remainder: Fearne on Contingent Remainders, 10th ed. vol. i. p. 398; *Duke of Norfolk's Case*. (6)

It is going too far to contend that no limitation can be construed as an executory devise unless it is impossible for it to take effect as a contingent remainder. It will be construed as the one or the other according to the event, so as to effect the testator's intention. Thus in a gift to a class the same limitation may take effect as an executory devise as regards some members of

(1) (1881) 18 Ch. D. 524.
(2) (1883) 24 Ch. D. 633.
(3) [1891] 3 Ch. 150.
(4) (1864) 12 W. R. 636.
(5) (1671) 2 Wms. Saund. 380, 388.
(6) (1685) 3 Ch. Ca. 1; Pol. 223.

PARKER J. 1908 WHITE v. SUMMERS.

the class and as a remainder as regards others—e.g., in a gift to a tenant for life, and after his death to his children at twenty-one, when some of his children have attained twenty-one at his death and some attain it afterwards. In the present will the words "who shall first attain or have attained" must be referred to the date of the termination of the particular estate, and must mean "who shall have attained twenty-one when the limitation takes effect in possession or shall thereafter attain that age." The testator here, like the testator in *In re Wrightson* (1), did not intend the gift necessarily to take effect in possession on the termination of the preceding estate, but only on the donee's attaining a certain age. And, as in that case, his intention will be carried out by construing the gift as an executory devise, because that is the only way in which effect can be given to it. This is not necessarily contrary to the rule laid down in *Purefoy* v. *Rogers* (2), though it may modify it. But in any case *In re Wrightson* (1) is a decision of the Court of Appeal and is binding in this Court. The reasoning of all the judges in the Court of Appeal is founded on the intention of the testator, and not on its being impossible that the limitation should operate as a contingent remainder. In the older cases, such as *Festing* v. *Allen* (3), there was no indication on the face of the will that the testator intended that the donees should take whether the contingency happened before or after the termination of the former estate. In *In re Lechmere and Lloyd* (4) and *Dean* v. *Dean* (5) the Court found the intention expressed by the words "before or after," and in the former case Jessel M.R. says: "In *Brackenbury* v. *Gibbons* (6) the gift was, in reality, to two classes of children, children who should attain twenty-one before the death of the tenant for life, and children who should attain twenty-one after the death"; and he refused to follow that case. In *In re Wrightson* (1) the Court went one step further by finding this intention, though the words "before or after" did not occur. In this case the words "have attained or shall attain" bring it within the rule as laid down by Jessel M.R.

(1) [1904] 2 Ch. 95.
(2) 2 Wms. Saund. 380, 388.
(3) (1843) 12 M. & W. 279.
(4) 18 Ch. D. 524, 527.
(5) [1891] 3 Ch. 150.
(6) (1876) 2 Ch. D. 417.

[PARKER J. Do not the words "who shall attain twenty-one" mean who shall at any time ?]

It makes all the difference whether the testator has split the event or not, as has been decided in cases of perpetuity: *In re Bence*. (1) In *Holmes* v. *Prescott* (2) the real estate was not claimed, and the observations of the Vice-Chancellor on this question are merely obiter.

But if the Court is against us on this point, the plaintiff has still to shew a good title in himself. All the limitations after the estates tail to the sons of James are "in default of such issue." It is settled by the authorities that these words are not technical, but will be construed according to the general intention of the testator. It is quite clear in this case that the testator did not intend Frances Hannah Eliza Summers or any of her issue to take unless James Summers had no son who attained twenty-one. This event did not happen, and therefore all the limitations over failed: *Doe* v. *Dacre* (3); *Keene* v. *Dickson* (4); *Hopkins* v. *Hopkins* (5); *Russel* v. *Buchanan* (6); *Alexander* v. *Alexander*. (7)

Romer, K.C., in reply, cited on the second point, in addition to the authorities above cited, *Hennessey* v. *Bray*. (8)

Cur. adv. vult.

April 6. PARKER J. The first question which arises for determination in this case is whether the limitation after the estates in tail male by the will conferred on the sons of John Bowen, severally and successively, according to seniority is a contingent remainder or an executory devise. The limitation is framed so as to take effect immediately on the determination of such estate tail, and is in favour of the eldest or other son of James Summers who shall first attain or have attained the age of twenty-one years. It is clearly a contingent limitation, but the contingency is such that it may happen before the determination of the preceding estate of freehold. Being limited to take effect immediately

(1) [1891] 3 Ch. 242.
(2) 12 W. R. 636.
(3) 1 Bos. & P. 250.
(4) (1783) 1 Bos. & P. 254, n.
(5) Cas. t. Tal. 44; 1 Atk. 581; 1 Ves. Sen. 268.
(6) (1834) 2 C. & M. 561.
(7) (1855) 16 C. B. 59.
(8) (1863) 33 Beav. 96.

PARKER J. 1908 WHITE v. SUMMERS.

after the determination of a particular freehold estate upon a contingency which may happen before such determination, it has all the requisites of a good contingent remainder, and would have been valid as such if, together with the estates which precede it, it had been created by a common law conveyance operating irrespectively of the Statute of Uses. It is a well-known rule—except, of course, in cases where the Contingent Remainders Act, 1877, is applicable—that no limitation capable of taking effect as a contingent remainder shall, if created inter vivos, be held to be a springing use under the Statute of Uses, or, if created by will, be held to be an executory devise under the Statute of Wills or the Wills Act, 1837. If this rule be applied, the limitation in question must be held to be a contingent remainder. But it is suggested that the rule must always yield to a clear expression of a testator's intention to the contrary, and that in the present case the testator's intention to the contrary is clearly expressed. I propose to consider shortly how far it can be said to depend on a testator's intention whether or not the rule be applicable.

In the case of limitations created inter vivos the rule has clearly arisen from judicial decisions as to the effect of the Statute of Uses, having regard to the principles of feudal tenure, and not from any consideration as to the real intention of the settlor. That this is so will appear from the following considerations. Take the case of a conveyance before the statute to A. and his heirs to the use of B. (a bachelor) for life, and after his death to the use of his eldest son who should attain the age of twenty-one years in fee simple. The intention of the settlor is clear. B.'s eldest son is intended to take the fee simple if he attain twenty-one years whenever that event happens, and equity would compel A. to give effect to the intention if and whenever B.'s son attained that age. If, on the other hand, the conveyance had been by way of common law limitations and not to uses, B.'s son could only have taken the fee simple if he had attained twenty-one years before the determination, whether by death or otherwise, of B.'s estate for life. For the effect at the common law of limitations of real estate did not depend on the settlor's intention, but on the principles of feudal tenure. When the

Statute of Uses converted the equitable interest taken by B. and his eldest son under the limitations we are considering into legal interests, the question at once arose whether the legal interest conferred by the statute on B.'s eldest son was a contingent remainder liable to failure on principles of feudal tenure in the same manner as if it had been created before the statute by a conveyance to common law limitations, or whether it retained the immunity from failure which upon equitable principles it had possessed as a mere use before the statute. It fell, of course, to the Courts of Common Law, and not to the Courts of Equity, to decide this question, and, having regard to the preamble and avowed object of the Statute of Uses, it was not unnatural that the common law Courts should decide—as they in fact decided—that the interest conferred on B.'s eldest son by the statute was a contingent remainder, and as such liable to failure, although it was manifest that this decision would defeat the settlor's intention, to which the Courts of Equity would have given effect. That the decision turned on questions of law and public policy rather than any question of intention is clear from *Chudleigh's Case* (1), wherein may be found a dismal catalogue of the disasters which would befall the Commonwealth if a limitation operating under the statute and capable of taking effect as a contingent remainder were held to be free from that liability to forfeiture to which all contingent remainders were subject at common law. It was only when the statute created estates which could not be upheld as good common law limitations that the settlor's intention was the material consideration, for to such estates, ex hypothesi, no principle of feudal tenure was applicable.

After the Statute of Wills a precisely similar question arose as to contingent limitations contained in wills, and it was similarly held that if the limitation was such as to fulfil the requisites of a good contingent remainder at common law, it was and must be held to be a contingent remainder and liable to failure accordingly, and could never be given effect to as an executory devise free from such liability. This appears to have been first laid down by Lord Hale in *Purefoy* v. *Rogers* (2), a

(1) (1589) 1 Rep. 113b. (2) 2 Wms. Saund. 380.

PARKER J. 1908 WHITE v. SUMMERS.

case referred to by Lord Kenyon in *Doe* v. *Morgan* (1) as laying down a rule which has since prevailed without any exception to the contrary. Lord Hale gives no reasons for his decision; but I think it also must have been based on principles of law and policy rather than on the intention of the testator. That this is so will appear from the following consideration: Suppose there be a devise to A. for life, with remainder to B. if he attains twenty-one. B. is clearly intended to take if he attains twenty-one, whenever that event happens. If, however, A. survives the testator and dies, leaving B. still a minor, the gift to B. fails, because his interest is a contingent remainder, and as such liable to failure if the contingency does not happen before the determination of the particular estate. On the other hand, if A. predeceases the testator, and B. is still a minor at the testator's death, B. will be entitled when he attains twenty-one. In this case the gift to him never could by any possibility, under the circumstances existing at the testator's death, take effect as a remainder; therefore it will be held a good executory devise, and the testator's intention will prevail: *Hopkins* v. *Hopkins*. (2) In *Holmes* v. *Prescott* (3) real estate was devised to certain limitations, including a contingent remainder which failed, because the contingency did not happen before the determination of the particular estate, and it could not, on the principle I am considering, take effect as an executory devise. Personalty was, however, by the same will bequeathed in trust for the persons who should for the time being be entitled to the real estate, and to go in the same manner, or as near thereto as the rules of law and equity would permit. It was held by Wood V.-C. that the mere fact of the testator's intention having, as to the real estate, been defeated by a rule of law could not operate to prevent its being given effect to with regard to the personalty, to which the rule of law had no application. The last-mentioned case also shews—as, indeed, had been decided twenty years earlier in the case of *Festing* v. *Allen* (4)—that the rule in question applies to a devise to a contingent class; for example, to A. for life, with remainder to

(1) 3 T. R. 763.
(2) Cas. t. Tal. 44.
(3) 12 W. R. 636.
(4) 12 M. & W. 279.

all and every his children or child who shall attain twenty-one years, although in such a case it is quite certain that the rule is eminently calculated to defeat the testator's intention. Next take the case of a devise to A. for life, with remainder to the eldest son of B. (a bachelor at the testator's death). This is clearly capable of taking effect as a contingent remainder, and must so take effect according to the rule. If, however, the devise be to A. for life, and after his death and one day to the eldest son of B. (a bachelor at the testator's death), this would be an executory devise, because it could never take effect as a remainder, there being a gap between the determination of the particular estate and the following limitation. The testator's intention would, however, be the same in each case. Again, if the limitation be to A. for life, with remainder equally between the eldest son of B. living at A.'s death and the first son of B. born after A.'s death, clearly as to the limitation to the eldest son of B. living at A.'s death it is a good contingent remainder, but as to the limitation to the first son of B. born after A.'s death it cannot take effect as a contingent remainder, because the contingency cannot happen till after the determination of the particular estate vested in A., and therefore it must be good, if at all, as an executory devise. The same principle would apply where there is a gift to A. for life, with remainder between a class all or some members of which could by no possibility be ascertained until after the determination of the particular estate; for example, a gift to A. for life and after his death equally between the children of A. then living and the children of B. thereafter to be born. In this case, too, the gift to B.'s children could never take effect as a contingent remainder, but, if good at all, could only be good as an executory devise. In my opinion a consideration of the foregoing examples shews that the real questions in each case are: (1.) What limitations does the will create? and (2.) Can such limitations take effect as remainders? And the question whether the testator intended the limitations to take effect in this way or that is immaterial. It must be remembered, however, that there can be no objection to a testator creating alternative gifts in favour of the same individual, one being a contingent remainder and one an

PARKER J. 1908 WHITE v. SUMMERS.

executory devise, and leaving the question which gift is to take effect to abide the event. Thus, in the case of a devise to A. for life, and after his death to B. if he shall have then attained twenty-one years, but if B. shall not have then attained twenty-one years, then to B. if and when he attains that age, there would be alternative gifts to B., one being a remainder and the other an executory devise, and which ultimately took effect would depend upon whether B. had or had not attained the age of twenty-one at the death of A. That such alternative limitations would be good appears from the case of *Evers* v. *Challis*. (1) It should be noticed, too, in the above instances that the estate given by way of remainder is not the same estate as the estate given by way of executory devise. The estate given by way of remainder takes effect, if at all, immediately on the determination of the particular estate; the estate given by way of executory devise arises subsequently, and during the interval the property the subject of the gift is undisposed of. I come to the conclusion, therefore, that the rule in question is a rule of law, and is applicable, whatever be the intention of the testator to the contrary, unless, indeed, such intention is expressed in language which, as a matter of construction, is sufficient to create some other alternative limitation capable only of taking effect as an executory devise, in which case the rule does not in reality yield to the intention, but the alternative gift comes into operation. For example, I think that, if a testator devised property to A. for life, and after the death of A. to B., if he should attain the age of twenty-one years, and then proceeded to declare that if the limitation to B. shall fail to take effect as a contingent remainder it shall take effect as an executory devise, there would be no difficulty in construing this as an alternative executory devise to B. upon his attaining the age of twenty-one years, after the determination of the particular estate supporting the contingent remainder limited in the first instance. If B. were a minor at A.'s death he would still get the benefit intended for him, not by virtue of a limitation as to which the testator had succeeded in excluding the application of a rule of law, but by virtue of another limitation contained in the will. The contingent remainder would still be defeated by the rule,

(1) (1859) 7 H. L. C. 531.

but the executory devise whereby he obtained an estate, not commencing with the determination of the particular estate, but after such determination and a further interval, would take effect. The intention of the testator, as disclosed by the words of his will and the surrounding circumstances, is, of course, all-important in determining what limitations are created by the will, but it seems to me that when once those limitations have as a matter of construction been ascertained it is a pure question of law whether this or that limitation is a contingent remainder or an executory devise.

I will now proceed to consider the four authorities which were cited in support of the proposition that the rule of law must yield to the clearly expressed intention of the testator. First, there are the three cases of *In re Lechmere and Lloyd* (1), *Miles* v. *Jarvis* (2), and *Dean* v. *Dean*. (3) These cases do not appear to me to present any real difficulty. In each of them there was a devise to a tenant for life, and after his death equally between a class so defined as to include persons who could not be ascertained until after the determination of the particular estate, or, as the Master of the Rolls put it in *In re Lechmere and Lloyd* (1), to two classes, one of which could only be ascertained after the determination of the particular estate. The gift in favour of those persons, or that class, must clearly, if good at all, be good as an executory devise, and could not take effect as a remainder. As Chitty J. said in *Dean* v. *Dean* (3), the Court could not construe the gift as a remainder unless it struck out part of the express limitation. More difficulty, however, seems to me to arise on the case of *In re Wrightson*. (4) In that case the testator devised freeholds upon a series of legal limitations, including a limitation which took effect in possession to William Henry Battie-Wrightson for life, and a limitation after his death to the plaintiff in tail male. The testator also made a codicil declaring that no devisee of the real estate under his will should have a vested interest therein or be entitled to the possession thereof until he attained the age of twenty-four years. The plaintiff had not attained the age of twenty-four years when

(1) 18 Ch. D. 524.
(2) 24 Ch. D. 633.
(3) [1891] 3 Ch. 150.
(4) [1904] 2 Ch. 95.

PARKER J. 1908 WHITE v. SUMMERS.

his father's life interest, which supported the remainder in his favour, determined. Therefore, if the interest given to the plaintiff by the joint operation of the will and codicil was simply a contingent remainder, it failed, and in normal course the next vested estate in remainder would take effect. The Court, however, as I read the case, came to the conclusion that upon the true construction of the codicil there was an executory gift to the plaintiff on his attaining twenty-four years, after his father's death, and that such executory gift, being void for remoteness, not only failed itself, but caused the failure of all the subsequent limitations. It is not clear in the judgments what view would have been taken if the plaintiff had attained the age of twenty-four in his father's lifetime. If in that event he could have taken, it can only have been because his remainder, originally contingent, had become vested before the determination of the particular estate. On this hypothesis the decision of the Court of Appeal is only consistent with the codicil having not only made the remainder given by the will a contingent remainder, but also having created, in the events which happened, an alternative gift by way of executory devise taking effect, not eo instanti with the determination of the particular estate, but after such determination and a further interval of time, there being during such interval an intestacy. There would be nothing in principle to preclude such an alternative gift, and if on the true construction of the will and codicil such an alternative gift was held to arise, there would be nothing in the case which could in any way conflict with the rule. On the other hand, if the only gift in favour of the plaintiff created by the joint operation of the will and codicil were a gift to take effect immediately after the determination of his father's life interest contingently on the plaintiff attaining the age of twenty-four years, I think this gift would be capable of taking effect as a remainder, and could not, therefore, according to the rule, be held to be an executory devise. It is quite clear, in my opinion, that none of the judges who were parties to the decision in *In re Wrightson* (1) considered that they were departing in any way from the rule; and I have, therefore, come to the conclusion

(1) [1904] 2 Ch. 95.

that they did not really (as was pressed upon me in argument) hold that a limitation capable of taking effect as a contingent remainder was an executory devise by virtue of the testator's intention, but that, in the events which had happened, there was an alternative and independent executory devise in the plaintiff's favour as well as the contingent remainder which failed. This seems in fact reasonably clear from a passage in the judgment of Cozens-Hardy L.J. "I hold," he says, "that the plaintiff cannot succeed under the limitations of the will, because he was not twenty-four at his father's death"—that is, he could not take under the gift by way of contingent remainder —" or " the learned judge goes on, " under the codicil, assuming it is to operate by way of executory devise, because of remoteness." (1) And the learned judge subsequently holds that the codicil does create an executory devise, which, being void for remoteness, not only itself failed, but caused the failure of all subsequent limitations. Similarly Stirling L.J. appears to me to hold the true meaning of the codicil to be not only that the plaintiff should not take the estate unless he attained twenty-four years of age in his father's lifetime, which made the remainder given to him by the will contingent on that event, but that he should take it if and when he attained the age of twenty-four after his father's death, thus creating a limitation which could not possibly take effect as a contingent remainder, because it was not limited to take effect eo instanti with the determination of the particular estate, and, therefore, if good at all could only be good as an executory devise. If, as I think, this interpretation of the decision in *In re Wrightson* (2) be correct, there is nothing in any of the authorities to justify the contention that whether the rule in question is to be applied or not in the present case depends in any way on the intention of the testator. No doubt in construing William Bowen's will and determining what limitations are thereby created I am bound to give effect to the testator's intention as gathered from the will itself and the circumstances under which it was made; but if I come to the conclusion that on the true construction of the will, having regard to the surrounding circumstances, there is only

(1) [1904] 2 Ch. 106. (2) [1904] 2 Ch. 95.

PARKER J. 1908 WHITE v. SUMMERS.

one limitation in favour of the eldest son of James Summers, and that this limitation is to take effect immediately upon the determination of the prior legal limitations upon a contingency which may happen before such determination, I am, I think, bound to hold that that limitation is a contingent remainder, even though the intention of the testator would be thereby defeated. As I have said already, there is only one limitation expressly created, and it is a limitation to take effect immediately on the determination of the preceding estates of freehold, and, though it is subject to a contingency, such contingency may well happen before the determination of the preceding estates. It is, therefore, undoubtedly capable of taking effect as a contingent remainder, and therefore is a contingent remainder. The only question seems to me to be whether there is sufficient evidence that the testator intended to create an alternative gift by way of executory devise, a gift not to take effect eo instanti with the determination of the particular estate, but after such determination, and a further interval, during which the estate would be undisposed of. The only expression in the will from which such an intention might be gathered is the expression "shall attain or have attained." It was suggested that because of these words I ought to read the limitation as to the eldest son of James Summers, who shall have attained the age of twenty-one years at the determination of the preceding estates (a contingent remainder), or, alternatively, if there were no such son, to the eldest son who should attain that age after the expiration of the preceding estates (an executory devise). If I could thus read the limitation the case would be within *In re Wrightson* (1), and the alternative gifts would be free from objection on the principle of *Evers* v. *Challis*. (2) But I do not think the mere use of the expression "shall attain or have attained" can justify me in making so extensive an alteration in the express limitation. The words "shall attain" look to the future, and the words "have attained" look back on the past, and the latter words appear to me to be added per cautelam to shew that the particular point of time from which the contingency is contemplated is to make no difference. It may be

(1) [1904] 2 Ch. 95.

(2) 7 H. L. C. 531.

noticed that the analogous words used in *Holmes* v. *Prescott* (1) did not enlarge the class in whose favour the gift was made so as to create an executory devise in favour of a child who had not attained twenty-one before the determination of the particular estate; and in *In re Lechmere and Lloyd* (2), Sir George Jessel mentions this case without disapproval. In my opinion, therefore, the limitation in question was simply a contingent remainder which failed.

The second question I have to determine is whether, on the death of John Bowen without male issue and the failure of the contingent remainder to the eldest son of James Summers, the next limitation to Frances Hannah Eliza Summers for life took effect in possession, or whether I ought to construe such last-mentioned limitation as contingent on James Summers having no son who lived to attain the age of twenty-one years. This depends entirely on the true construction of the words "in default of such issue" following the contingent limitation in favour of the eldest or other son of James Summers, who should attain or have attained the age of twenty-one years. In my opinion, the words "in default of such issue" are, and as a matter of conveyancing always have been, considered and used as apt words for the introduction of a remainder and not as words of contingency. In the case of a conveyance to A. for life, and after his death to his first and other sons successively and the heirs male of the bodies of such sons, and in default of such issue to B., his heirs and assigns, as well the words "after his death" as the words "in default of such issue" have, I think, always been used simply as introducing remainders and not as pointing to any definite time when, or any definite contingency upon which, the limitations were to take effect. Thus, if A., having a son, forfeited his life estate, A.'s son would become entitled in possession though A. was still alive; and again, if A., having no son, forfeited his life estate, B. would become entitled in possession though A. might thereafter have a son. If this were not so, limitations "after the death" of a tenant for life or "in default of male issue of A." after a limitation to A. in tail male, would be contingent limitations. The result of this would in

(1) 12 W. R. 636. (2) 18 Ch. D. 524.

PARKER J. 1908 WHITE v. SUMMERS.

times past have been far more important than it is now, for, in the first place, there were difficulties in alienating contingent interests; and, in the next place, if the ultimate limitation were contingent it would make all the difference in applying the doctrine of merger. As Fearne puts it on p. 340 of his book on Contingent Remainders (10th ed. vol. i.): "If there be tenant for life, remainder in tail in contingency, remainder in tail in esse; and the tenant for life, and he in remainder in tail in esse, levy a fine . . . . the mean contingent remainder is destroyed." This, of course, must be because the remainderman in tail in esse has a vested estate (see Challis on Real Property, 2nd ed. p. 126). The text-books seem to treat it as quite clear that a gift to A. for life, and after his death to his eldest son and the heirs of the body of such son, and in default of such issue to B., his heirs and assigns, confers on B. a vested remainder which can and will take effect on the determination by forfeiture or otherwise of A.'s interest before A. has a son (see Burton on Real Property, 7th ed. pp. 8, 9; Jarman on Wills, 5th ed. pp. 757 and 1293, note (*c*); Davidson's Precedents, 3rd ed. vol. iii. pp. 333-5; Powell on Devises, 3rd ed. vol. ii. p. 220). That there is no actual case which decides the point arises, I think, from the fact that it has been considered too plain for argument. For example, it is certainly assumed in *Hopkins* v. *Hopkins* (1) that, if the limitation in question were a remainder, the gifts in default of issue of joint tenants in tail vested when the persons to take under them were ascertained; and I think this is also assumed, if not expressly decided, in *Lewis* v. *Waters*. (2) In *Ashley* v. *Ashley* (3) and *Goodright* v. *Jones* (4), the prior gifts being interests for life only, a gift in default of such issue was held to introduce a vested remainder and not a contingent limitation. Indeed, it is difficult to know by what words a vested remainder after an estate tail could be aptly introduced if such words as in default or on failure of the issue or issue male of the tenant in tail or tail male were held to be words of contingency. I am not aware of any precedent, until comparatively recent times, for using the words "in remainder" in a series of legal limitations,

(1) Cas. t. Tal. 44.
(2) 6 East, 336.
(3) 6 Sim. 358.
(4) 4 M. & S. 88.

though where the effect of a settlement is stated shortly it is, and always has been, common to make use of that expression. In *Whitfield* v. *Bewit* (1) the settlement is stated as to the use of the grantor for life, remainder to the use of A. for life, remainder to his first, &c., sons in tail male successively, remainder to his two sisters and the heirs of their bodies, remainder to the grantor in fee. A., being tenant for life, in possession, having had no issue, cut down timber; one of the sisters was dead without issue. It was held that the timber belonged in moieties to the other sister and the heir of the grantor as having the first estates of inheritance, which means, of course, vested estates of inheritance. If the gift to the sisters had been contingent, the heir of the grantor would have taken the whole and not a moiety only. On reference to the record I find, as I expected to find, that the gift to the sisters was introduced by the words "in default of such issue" and created a tenancy in common in tail. I may add that the ultimate limitation in the present will to trustees upon trust after the failure or determination of the several prior estates to sell the property appears to point to the remainder to the trustees being a vested and not a contingent remainder. Several cases were cited to shew that such words as "in default of such issue" might properly be held to import a contingency. These, however, were cases of executory limitations after gifts in fee simple, as to which different considerations arise. In such cases there seems no reason why the gift over should not be construed strictly. It cannot be simply a remainder: it must either be in defeasance of a prior interest or itself constitute an alternative gift; and further, it cannot vest until the event upon which it is limited takes place: see, for example, *Doe* v. *Lucraft* (2), *Alexander* v. *Alexander* (3), *Russel* v. *Buchanan* (4), and *Festing* v. *Allen*. (5) I think, therefore, that the estate limited to Frances Hannah Eliza Summers for her life must be taken to be a vested remainder, and that she became, therefore, entitled in possession on the death of John Bowen without issue. On her death in

(1) (1724) 2 P. Wms. 240.
(2) (1832) 8 Bing. 386.
(3) 16 C. B. 59.
(4) 2 C. & M. 561.
(5) 12 M. & W. 279.

PARKER J. 1908 WHITE v. SUMMERS

1906 the plaintiff became entitled in possession as tenant in tail male, and as such he is, in my opinion, entitled to recover the property.

Solicitors: *Emanuel & Simmonds, for Robert Lock & Muncaster, Tenby; Peacock & Goddard.*

J. R. B.

PARKER J. 1908 *May* 26, 27, 28; *June* 3.

PHILIPPART *v.* WILLIAM WHITELEY, LIMITED.

[1907 P. 2164.]

In re PHILIPPART'S TRADE MARK "DIABOLO."

Trade Mark — Registration — Invented Word — Reference to Character and Quality of Goods—Descriptive Name—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 35, 36, 37.

In May, 1905, P. registered, as a trade mark, under the Patents, Designs and Trade Marks Acts, 1883 to 1888, the word "Diabolo" in respect of tops. The word was not then a word current in the English language, but was to be found in some Italian dictionaries as a variant for "diavolo." The top in respect of which the mark was registered and used was a double-coned one which was adapted to be rotated by a cord attached to two flexible rods, the top and the rotatory apparatus forming the means of playing a game which with some improvements was a revival of a game played about the beginning of the nineteenth century, in France called "le diable" or "le jeu au diable" and in England "the devil on two sticks":—

Held, that as the word "Diabolo" was such as to suggest to ordinary minds (and selected so to suggest) the devil or something in which the devil played a part, it was not an invented word or a word having no reference to the quality or character of the goods, and was not a registrable trade mark and must be removed from the register of trade marks.

Observations as to the meaning of s. 36 (removal of marks already on the register at the commencement of the Trade Marks Act, 1905) and s. 37 (as to removal of marks for want of bona fide intention of user in connection with goods).

Quære, whether the word was not also open to objection because it was not at the date of registration used or proposed to be used to indicate that the goods to which it applied were the goods of the person asking for registration.

GUSTAVE PHILIPPART early in the year 1905 began in France to manufacture, sell, and deal with a kind of double top and an

apparatus consisting of a cord attached to two flexible rods by which the top was adapted to be rotated and acquire a gyroscopic action.

He had in 1904 become acquainted with an ancient game, popular at the end of the eighteenth century and the beginning of the nineteenth century in France and England, called in France "le diable" or "le jeu au diable" and in England "the devil on two sticks."

Philippart made some slight improvements in the top, and early in 1905 came to England with a view to rehabilitating the game, and after consultation with Mr. C. B. Fry, the well-known cricketer, he registered in England, under the Patents, Designs and Trade Marks Acts, 1883 to 1888, the word "Diabolo" in respect of tops included in class 49, the number of the mark being 274,557.

The tops were manufactured in Paris, and large numbers of them were imported into England and sold under the registered mark.

The Trade Marks Act, 1905, was passed on August 11, 1905, came into operation, save as otherwise expressly provided, on April 1, 1906, and repealed the general provisions of the Acts of 1883 and 1888 with reference to trade marks.

On May 1, 1907, Philippart entered into partnership with H. O. Kratz Boussac, and on October 8, 1907, commenced the present action against a company called William Whiteley, Limited, alleging that the company had infringed the registered mark by selling and offering and advertising for sale double tops and sticks under or in connection with the word "Diabolo" not being manufactured, sold, or dealt with by Philippart, and also alleging that the company had passed off its goods as those of Philippart.

Philippart claimed—(*a*) an injunction to restrain the company from infringing the registered mark by using the word "Diabolo" on or in connection with goods not sold or otherwise dealt with by Philippart; (*b*) an account of profits or damages and delivery up of goods having thereon the word "Diabolo" in order that such trade mark might be obliterated, and also delivery up for destruction of all labels bearing the trade mark; and (*c*) an

PARKER J. 1908 PHILIPPART v. WILLIAM WHITELEY, LIMITED. PHILIPPART'S TRADE MARK "DIABOLO," *In re.*

injunction to restrain the alleged passing-off of the company's goods as those of Philippart.

Boussac was afterwards joined as a co-plaintiff with Philippart.

The defendant company pleaded that the game was not a new game in 1905, but had existed for upwards of a century prior to that date; that the registration was wrongful; that the name "Diabolo" was the name of the game and instruments and could not be appropriated by any individual maker; and they denied infringement and passing-off.

The defendant company also moved, under s. 35 of the Trade Marks Act, 1905, to have the trade mark "Diabolo" expunged from the register of trade marks.

The action was tried and the motion was heard on May 26, 27, and 28, 1908.

T. Terrell, K.C., E. F. Spence, and *Courtney Terrell,* for the plaintiffs. The word "Diabolo" is a good registrable trade mark under s. 9 of the Trade Marks Act, 1905, either as an "invented word" or as "a word . . . having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname." The word is quite as good a mark as many other words which have been held to be good marks—for instance, "Vaseline" in *In re Chesebrough's Trade Mark "Vaseline"* (1), "Tabloid" in *In re Burroughs, Wellcome & Co.'s Trade Marks* (2), "Bovril" in *In re Trade Mark No.* 58,405, "*Bovril*" (3), "Kodak" in *Kodak, Ld.* v. *London Stereoscopic and Photographic Co.* (4), and "Savonol" in *J. C. & J. Field, Ld.* v. *Wagel Syndicate, Ld.* (5) Soap is more suggested by "Savonol" than "diable" is by "Diabolo." Under the Patents, Designs and Trade Marks Act, 1883, an invented word might be registered although it had reference to the character or quality of the goods; and the word is none the worse for being a foreign word: *Eastman Photographic Materials Co.* v. *Comptroller-General.* (6) In that case the word was the

(1) [1902] 2 Ch. 1.
(2) [1904] 1 Ch. 736.
(3) [1896] 2 Ch. 600.
(4) (1903) 20 Rep. Pat. Cas. 337.
(5) [1900] 1 Ch. 651; 17 Rep. Pat. Cas. 266.
(6) [1898] A. C. 571.

Italian word "Solio," but "Diabolo" is not a good Italian word, and it does not refer to the character or quality of the goods. It was invented by Philippart as the name for a game, and he has the right to have it protected. His case is not like that of a patentee whose patent has expired, and who is not in future entitled to the exclusive use of the name: *Linoleum Manufacturing Co.* v. *Nairn* (1); *In re Magnolia Metal Co.'s Trade Marks* (2); *In re Gestetner's Trade Mark.* (3) In the case lastly cited Buckley L.J., referring to s. 36 of the Act of 1905, says (4): "I think it may be read thus, Take the facts of to-day and the law of to-day and inquire whether, if the mark in question were taken off the register, it would on the facts of to-day and the law of to-day be entitled to be entered again upon the register. If so, it must remain upon the register."

As regards passing-off, it is shewn by the evidence that the name "Diabolo" has become attached to the plaintiffs' goods; and it is therefore immaterial whether the purchasers of the defendants' goods knew whether they were or were not the goods of the plaintiffs.

Buckmaster, K.C., and *Sebastian*, for the defendant company. In the first place, at the date of registration the mark was not "used or proposed to be used upon or in connexion with goods for the purpose of indicating that they" were "the goods" of Phillipart, and therefore the mark is not a trade mark as defined by s. 3 of the Act of 1905.

Then, having regard to the history of the game, the word imports something in connection with the devil, and as a top is concerned there is a clear reference to the old game of "the devil" or "the devil on two sticks." If the mark is not good as a trade mark the defendant company may lawfully sell the game called by the name used in connection with it: *In re Leonard and Ellis's Trade Mark.* (5)

"Diabolo" is not an invented word, but the equivalent in Italian for a similar and well-known English word. Its meaning in Italian is the same as that of the word "diavolo," namely,

(1) (1878) 7 Ch. D. 834.
(2) [1897] 2 Ch. 371.
(3) [1908] 1 Ch. 513.
(4) Ibid. 521.
(5) (1884) 26 Ch. D. 288.

PARKER J. 1908 PHILIPPART v. WILLIAM WHITELEY, LIMITED. PHILIPPART'S TRADE MARK "DIABOLO," *In re.*

devil. The ordinary name of a thing in an European country was not a "fancy word" within the meaning of the Act of 1883: *In re Davis, Bergendahl & Co.'s Trade Marks.* (1) The same principle is applicable in the case of invented words.

In *Eastman Photographic Materials Co.* v. *Comptroller-General* (2) the word "Solio" was an Italian word which did not in any way refer to the goods. The word "Reversi" was held to be bad as a trade mark because it would suggest to an ordinary Englishman the idea that the game had something to do with reversing, and therefore had some reference to the character of the game in connection with which the word was used: *Waterman* v. *Ayres.* (3) The trade mark ought, therefore, to be taken off the register, even if it was rightly put on in the first instance. There is no evidence of passing-off. The defendant company has only supplied the materials necessary for playing the game for which it was asked.

T. Terrell, K.C., in reply. The nature of the game is not explained by a reference to the "devil," which is a word with more meanings than one. An invented word need not be absolutely new, or invented for the purpose, in order to be a good trade mark: *In re Linotype Co.'s Trade Mark.* (4)

It is the duty of the defendant company when selling the game to obviate any reasonable possibility of misunderstanding or deception: *Singer Manufacturing Co.* v. *Loog.* (5) [He also referred to *In re "Apollinaris" Trade Mark.* (6)]

Cur. adv. vult.

June 3. PARKER J. The plaintiffs in this action claim relief on two grounds. First, they say that the defendants have infringed their trade mark, which consists of the word "Diabolo" and was registered under date May 16, 1905, in respect of tops included in class 49. Secondly, they complain that the defendants have passed-off, as and for the plaintiffs' goods, goods which were not, in fact, manufactured, sold, or otherwise dealt with by them. The defendants deny the infringement, repudiate any such

(1) (1888) 6 Rep. Pat. Cas. 207.
(2) [1898] A. C. 571.
(3) (1888) 39 Ch. D. 29.
(4) [1900] 2 Ch. 238.
(5) (1882) 8 App. Cas. 15.
(6) [1907] 2 Ch. 178.

passing-off or attempt to pass off, as alleged, and, further, apply, under s. 35 of the Trade Marks Act, 1905, to have the trade mark "Diabolo" removed from the register.

I will first deal with the application to remove the trade mark. The word "Diabolo" was registered under the Acts of 1883 and 1888, and if it was properly registered it must have been (1.) because it was an invented word, or (2.) because it was a word having no reference to the character or the quality of the goods in respect of which it was proposed to register it. First, let me consider whether it was an invented word. To be an invented word, within the meaning of the Act, a word must not only be newly coined in the sense of not being already current in the English language, but must be such as not to convey any meaning, or at any rate any obvious meaning, to ordinary Englishmen. It must be a word having no meaning, or no obvious meaning, until one has been assigned to it. I use the expression "obvious meaning" and refer to "ordinary Englishmen" because, to prevent a newly-coined word from being an invented word, it is not enough that it might suggest some meaning to a few scholars. Further, while on the one hand the fact that a word may be found in the vocabulary of a foreign language does not, in itself, preclude it from being an invented word, so, on the other hand, a foreign word is not an invented word merely because it is not current in the English tongue.

Applying these principles, all of which may be found in the authorities, to the present case, there can be no doubt that the word "Diabolo" was not, at the date of its registration, a word current in the English language. On the other hand, it is a word found, according to several dictionaries, in the vocabulary of the Italian language as a variant for "diavolo," which means and is etymologically the same as the English word "devil" and the French word "diable"; and, having regard to the fact that "diabolical" is a current English word, I cannot doubt that an ordinary Englishman, seeing or hearing the word for the first time, would at once conclude that it contained a reference to the devil, or to something in which the devil played a part. Taken by itself, therefore, without reference to its origin, its seems to lack one of the required characteristics of an invented word.

PARKER J. 1908 PHILIPPART v. WILLIAM WHITELEY, LIMITED. PHILIPPART'S TRADE MARK "DIABOLO," *In re.*

In determining whether "Diabolo" is or is not an invented word it is, however, not immaterial to consider how the word originated. If it be found that the person who claims it as an invented word invented or selected it because of the probability of its suggesting to ordinary Englishmen either the devil or something in which the devil plays a part, the conclusion that it would carry this suggestion is necessarily corroborated.

The genesis of the word "Diabolo" appears to be as follows: In the year 1904 the plaintiff Philippart became acquainted with a game known in France as "le diable" or "le jeu au diable," and in England as "the devil on two sticks." The game is said to be a very ancient one, and it had been popular at the end of the eighteenth and the beginning of the nineteenth century, both in France and England. It had subsequently fallen out of favour. None the less, there still continued in England a demand for the game which, though small, led to dealers continuing to stock the apparatus with which it was played.

The plaintiff Philippart appears to have considered the question whether the game could not again be made a popular pastime, and whether, with that object in view, he could not improve the double top or cone, which in playing the game was spun on a string between two sticks. He made certain improvements, which consisted chiefly in protecting the top from injury from falls by arming it, or parts of it, with indiarubber, and, having done so, he came early in 1905 to England and consulted Mr. Fry, the well-known cricketer, to whom he explained his project with regard to rehabilitating the game and the nature of the improvements he had made in the double top or cone. They discussed a name, but whether they were wanting a new name for the game which it was proposed to revive, or whether they wanted a name for the improved top, or whether they were devising a trade mark, is not clear on the evidence. The plaintiff Philippart seemed uncertain on this point, nor was he in other respects a very satisfactory witness. Mr. Fry was not called. For whatever purpose the name was wanted, the word "Diabolo" was suggested by Mr. Fry, and the plaintiff Philippart has from the very first told the world in the circulars enclosed with the goods sold by him that it was the ancient game reconstituted

according to modern ideas of sport that Mr. Fry had christened "Diabolo." For many purposes it would, of course, be advantageous to revive the game of "le diable" or "the devil on two sticks" under a name which would pass current in both England and France, and I conclude that the word "Diabolo" was selected for that purpose. The plaintiff did revive the game under the name "Diabolo," and has always advertised the revived game as "Diabolo," and his conduct in this respect confirms the conclusion at which I have arrived. If it be asked how Mr. Fry came to hit on the word, there is again no satisfactory evidence. The natural inference, and the inference which I draw, is that the word was selected as suggesting that the revived game was identical with the old game of "le diable," or "the devil on two sticks," and that the devil played the same part in both. Mr. Philippart, whose knowledge of Greek and Latin is extremely limited, endeavoured to make out that the devil, or its equivalent in other languages, was entirely unconnected with the selection of the word; but I find it impossible to accept his evidence in this respect, unconfirmed as it is by Mr. Fry himself.

Such being the genesis of the word "Diabolo," and finding as I do that the word is such as to suggest to ordinary minds the devil, or something in which the devil plays a part, that it was selected and, so far as it can be said to have been coined or invented, was coined or invented with the object of making this suggestion, and that it is merely a variant for the ordinary Italian word meaning the devil, I do not think I should be justified in holding that it is an invented word or registrable as an invented word within the Trade Marks Acts.

I proceed, therefore, to consider whether "diabolo" is a word having no reference to the character or quality of the goods in respect of which it is registered. It is registered, as I have said before, in respect of tops included in class 49. Among the tops so included is the double-coned top used in the old game of "le diable," or "the devil on two sticks," and the intention of the plaintiff Philippart in so registering it was to use it primarily in connection with tops forming part of the apparatus used in this game, which he proposed to revive under the name "Diabolo."

PARKER J. 1908 PHILIPPART v. WILLIAM WHITELEY, LIMITED. PHILIPPART'S TRADE MARK "DIABOLO," *In re.*

The plaintiff Philippart admits, and it is, I think, reasonably clear, that in the English game of "the devil on two sticks" it is the top which is primarily referred to as the devil. The game was a favourite one with James Clerk Maxwell from his boyhood. He and his family used to refer to it as "the devil" or "the deil," but the devil in the game was the double-coned top. This appears from the following passage in one of the professor's letters, written in 1848: "Then a game of the devil, of whom there is a duality and quaternity of sticks, so that I can play either conjunctly or severally. I can jump over him and bring him round without leaving go the sticks. I can also keep him up behind me." He also refers, elsewhere in his correspondence, to "turning" devils, or getting a devil made, the devil being, in each case, the double-coned top used in the game: see Campbell and Garnett's Life of James Clerk Maxwell, Macmillan, 1884, pp. 45, 53, 73, 85, and 169. Several references to the game will be found in Notes and Queries, 6th series, vol. iv. at pp. 29, 131, and 175, and in all these references it is the double-coned top to which the word "devil" is applied. Mr. Hamley, the well-known toy dealer, who has known the game for many years, has always associated the term "devil" with this double-coned top.

In France also, I think, there can be little doubt that it was the same top which was referred to as the devil. In the specifications to his letters patent of 1906 the plaintiff Philippart mentions the double-coned top as the well-known "diable" top. In Champfleury's "Histoire de la Caricature Moderne" there is a reproduction of one of Gavarni's caricatures consisting of a lady playing the game, the double-coned top being, however, replaced by a mannikin or devil balanced across his middle on the string. On this Champfleury remarks that, according to Gavarni, a woman's rôle is to "endiabler" the man and make him (as well as his money) fly. It also appears from D'Allemagne's "Sports et Jeux d'Adresse" that the double-coned top was the devil in the French game of "le diable." I have no doubt that research would disclose further passages in French literature pointing to the same conclusion.

Under these circumstances I think the inference which ought to be drawn is that any one, either in France or England,

acquainted with the game of "le diable" or "the devil on two sticks," would, on seeing or hearing the word "Diabolo" applied to tops, identify the tops referred to as the double-coned tops used in that game. The word would suggest the kind of article or the use to which the article was to be put, and cannot, therefore, in my opinion, be a word having no reference to the character of the goods or registrable as such under the earlier Acts.

The Act of 1905 contains a provision (s. 36) that no trade mark which is on the register at the commencement of the Act, and which, under that Act, is a registrable trade mark, shall be removed from the register on the ground that it was not registrable under the Acts in force at the date of registration. Under s. 9, sub-s. 4, of the Act of 1905, any words having no direct reference to the character or quality of the goods is registrable provided that it otherwise fulfils the conditions of a trade mark under the definition clause. It was argued that the word "Diabolo," even if it had an indirect reference, certainly had no direct reference to the character or quality of the goods, and ought not, therefore, to be removed from the register. The meaning of s. 36 of the Act of 1905 was discussed, but not, I think, decided, by the Court of Appeal in the case of *In re Gestetner's Trade Mark.* (1) In that case, however, Buckley L.J. said that it might be read thus: "Take the facts of to-day and the law of to-day and inquire whether, if the mark in question were taken off the register, it would on the facts of to-day and the law of to-day be entitled to be entered again upon the register. If so, it must remain upon the register." He was clearly of opinion that it could not mean, "Take the facts at the date of actual registration, assume the Act of 1905 to have been then in force, and see whether, on that assumption, the entry on the register could validly have been made when it was made." With the opinion of Buckley L.J. as to what the section cannot mean I agree, but I think the section might well be interpreted as meaning, "Take the facts as they exist at the commencement of the Act of 1905. If on those facts the mark could then have been registered, it becomes, by virtue

(1) [1908] 1 Ch. 513, 521.

PARKER J. 1908 PHILIPPART v. WILLIAM WHITELEY, LIMITED. PHILIPPART'S TRADE MARK "DIABOLO," *In re.*

of the Act, rightly on the register, and cannot, therefore, be removed on the ground that it was not registrable under the earlier Acts." Such a meaning would, I think, be consistent with the latter part of s. 36, which appears to protect infringers of the marks to which this section applies from liability for acts done before but not after the commencement of the Act. I do not, however, think it necessary to decide this point, because, whether the facts now existing or the facts existing on April 1, 1906 (the date of the commencement of the Act), be considered, I have come to the conclusion that the word "Diabolo" could never have been registered for tops under the Act of 1905.

From the early summer of 1905 onwards the plaintiff Philippart admittedly sold the game in France as "Diabolo." By the spring of 1906 the game was becoming the rage in Paris. In July and August, 1906, whatever he may have done before that date, the plaintiff Philippart was advertising and selling the game in England under the name "Diabolo." In July, 1906, in an advertisement in the *Daily Mail*, "Diabolo" is referred to as the game which has fascinated Paris. It is mentioned as an ancient game called "Diabolo," recently revived by Parisian lovers of sport, and as likely to become as popular as tennis, golf, or cricket. In June, 1906, we find the plaintiff Philippart selling sets of the game to Mr. Hamley, and in July to the defendants, under the name "Diabolo," the invoices being headed "Diabolo game." On all sales the plaintiff Philippart has enclosed in the boxes containing the two sticks and the top a circular, either in French or English, stating that Mr. Fry had christened the game "Diabolo," and using the word "Diabolo" as the name of the game or sometimes of the top used in the game. All such boxes, and not only the top which accompanied the rest of the apparatus, were marked "Diabolo."

By the summer of 1907 the game had become the rage in England under the name "Diabolo."

If the facts as they now exist be considered, the word "Diabolo" is no more registrable for a double-coned top than the word "cricket" is registrable for a set of stumps. To every one who saw or heard the word applied to a top, it would directly denote the top used in the well-known game, just as "cricket," applied

to a set of stumps, would directly suggest the use to which the stumps were to be put. If the facts as they existed on April 1, 1906, the date of commencement of the Act of 1905, be considered, I think the same conclusion ought to be drawn, though the evidence is not quite so clear. On this ground alone I think there was never a time at which "Diabolo" could have been registered for tops under the Act of 1905.

I am not, however, at all satisfied that the word "Diabolo," as applied to tops, is free from objection under the Act of 1905 upon other grounds. Every trade mark under that Act must, at the date of registration, either be actually used, or be proposed to be used, for the purpose of indicating that the goods to which it is applied are the goods of the person asking for registration. It seems to me that a person who is advertising or bringing on the market under a particular name a game which every one has a right to sell, and is, at the same time, marking part of the apparatus used in the game with the name of the game, can hardly be said to be using the mark for the purpose of distinguishing his own goods from those of other manufacturers; and similarly an intention to use the name as the name of the game seems to me to be inconsistent with any bona fide intention to use it as a distinguishing mark for his own goods. Under the principles of law applicable to trade marks before any legislation on the subject, no mark was protected unless at the time of the alleged infringement it was being used for the purpose of distinguishing, and did distinguish, the goods of the owner from the goods of other people. By reason of the difficulty, if not the impossibility, of taking a mark off the register when once it had been properly put on under the Acts, it became possible for a trader to cease using his registered mark for its legitimate purpose as a trade mark without losing the benefit of his registration. Indeed, if he could identify his mark in the public mind with the article sold, it was to his advantage so to do, for he could thus, by preventing the sale of the article under the name by which it was known to the public, obtain a practical monopoly. I am inclined to think that the Act of 1905 has in part provided a remedy for this indirect result of trade mark legislation. For by virtue of the definition clause a registrable mark must, at the

PARKER J. 1908 PHILIPPART v. WILLIAM WHITELEY, LIMITED. PHILIPPART'S TRADE MARK "DIABOLO," *In re.*

date of the application for registration, if not used at any rate be intended to be used for the purposes for which alone, prior to the Acts, the Courts would have given a mark protection, and on the principle of *In re Batt & Co.'s Trade Marks* (1) the intention of the applicant for registration may be gathered from his subsequent conduct; and again, it may be that s. 37 will be construed as enabling the Courts to remove a mark which has ceased to be used, or has never been used, for the legitimate purposes of a trade mark.

In the present case I am of opinion that the plaintiff Philippart was not either at the commencement of the Act of 1905 or at the date when application was made to remove his mark using it, or bona fide intending to use it, for the purpose of distinguishing his own goods from the goods of others. If a person be taken to intend the probable and almost inevitable results of his own actions, he was using and intending to use the mark in such a way as to embarrass other traders in their efforts to meet, as they had a right to meet, the demands for a game which, by reason largely of what the plaintiff had done, or was doing, was known or being introduced to the public under the name "Diabolo." If this be so, the mark was never registrable under the Act of 1905 because it did not fulfil the conditions of the definition clause, and, further, I very much doubt whether it did not and does not also fall within the prohibition contained in s. 11 as a mark disentitled to protection in a Court of justice.

I hold, therefore, that the original invalidity of the registration is not cured by anything in the Act of 1905, and that the mark ought to be removed from the register.

The only point which remains for decision is the question of passing-off. There is, in my opinion, no satisfactory evidence that the defendants have ever passed off or attempted to pass off any goods not manufactured, sold, or dealt with by the plaintiffs as the plaintiffs' goods. They have, it is true, supplied, in answer to a demand for the game "Diabolo," sets of the game with which the plaintiffs had nothing to do, either in the way of manufacture or otherwise, and they have advertised

(1) [1898] 2 Ch. 432; 15 Rep. Pat. Cas. 262, 534.

themselves as selling the game "Diabolo," but there is no trustworthy evidence that any one with whom they dealt ever considered the word "Diabolo" as anything else than the name of a game or, in asking for "Diabolo," ever intended to get, or thought he was getting, goods of any particular manufacture or make. By calling the revived game "Diabolo" the plaintiff Philippart in fact invited every one to deal in the game under that name, and I do not see that he can complain because his invitation has been accepted. I therefore dismiss the action.

The action was dismissed with costs, and an order was made on the motion to expunge the mark from the register with costs to the applicant, including the costs (if any) of the comptroller.

Solicitors for the plaintiffs and the respondent on the motion: *Bull & Bull.*

Solicitors for the defendant company and the applicant to expunge: *Roche, Son & Neale.*

F. E.

In re JEWISH COLONIAL TRUST (JUEDISCHE (1) COLONIALBANK), LIMITED.

[1907 J. 027.]

Company—Memorandum of Association—Alteration—Fundamental Objects—Abandonment — Confirmation by Court — Jurisdiction — Discretion — Questions for Consideration — Principles applicable — Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-ss.* 4, 5 (*e*).

The Court has jurisdiction under s. 1, sub-s. 5 (*e*), of the Companies (Memorandum of Association) Act, 1890, to confirm an alteration in the memorandum of association of a company involving the abandonment of objects of a fundamental character and limiting the operations of the company from a world-wide area to a comparatively small prescribed region. But in a case where the constitution of the company placed it in the power of the controlling body of the company, who were in favour of such an alteration, to permit the extended powers of the company to lie dormant, and where the vast majority of the shareholders, representing over three-fourths of the share capital, had given no indication of their wishes on the subject, the Court refused to sanction the proposed alteration.

The provisions of sub-s. 5 of s. 1 of the Act furnish the only test for

(1) *Sic* as registered.

EVE J.

1908

JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

determining the question whether the Court has jurisdiction to sanction a proposed alteration of the memorandum of association.

The principles which have been laid down for the guidance of the Court in dealing with applications for confirmation of reduction of capital under s. 11 of the Companies Act, 1867, apply to the case of applications for confirmation of an alteration of the memorandum of association under s. 1 of the Companies (Memorandum of Association) Act, 1890, and, accordingly, all that the Court has to decide is whether the alteration is fair and equitable as between the members of the company. The Court is not concerned to consider the wisdom or desirability of the proposed alteration.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A. C. 399, and *Poole* v. *National Bank of China, Ld.*, [1907] A. C. 229, applied.

PETITION.

THE above-named company was incorporated in 1899 under the Companies Acts, 1862 to 1893, as a company limited by shares, and the registered office was in London.

The objects for which the company was established were set forth in thirty-one paragraphs contained in clause 3 of the company's memorandum of association, and the material objects were as follows.

"(1.) To promote, develop, work, and carry on industries, undertakings and colonization schemes in Palestine, in Syria, and in any other part of the world in any manner which may, in the opinion of the council for the time being of the company as defined by its original articles of association (hereinafter called 'the council'), be to the interest of the Jewish race in any country or place.

"(2.) To promote, develop, work, and carry on emigration or immigration from or into any country or countries into or from any other country or countries in any manner which the council may deem beneficial to the Jewish race in any country or place. And in particular to promote, develop, work, and carry on immigration of persons of the Jewish race into Syria, Palestine, and other countries in the East."

"(4.) To acquire from any State or other authority in any part of the world any commissions, grants, decrees, rights, powers and privileges whatsoever which may seem to the council likely to advance any of the objects of the company, and to work, develop, carry on, exercise, and turn to account the same."

Clause 3 also contained the following among other provisoes :—

"Provided also that all the powers conferred by this clause shall be exercised in such a manner as in the opinion of the council shall tend primarily to the creation of a legally assured home in Palestine for the Jewish people or shall be otherwise advantageous to people of the Jewish race, either generally or in any particular country or place. But so nevertheless that nothing herein contained shall create any trust or equity in favour of any individual or individuals or shall prevent the company (if it thinks fit so to do) from distributing the whole of its net profits among its members. And so also that this proviso shall be subject and without prejudice to the rights of any Sovereign or other authority in Palestine."

The capital of the company was 2,000,000*l.* divided into 2,000,000 shares of 1*l.* each, of which 100 were founders' shares and 1,999,900 ordinary shares. The whole of the founders' shares and 253,265 of the ordinary shares had been issued, and all the issued shares had been fully paid up in cash. About one-third of the ordinary shares were represented by share warrants to bearer, and the contributories were believed to number about 130,000, of whom the large majority resided in Russia, and the minority were dispersed all over the continent of Europe, and in Canada, Australia, South Africa, and the United States and South America.

The memorandum of association provided that the holders of the founders' shares should in respect of such shares be collectively entitled at every general meeting of the company or on any poll to so many votes as should be equal to the aggregate number of the votes to which all the persons or corporations present, either personally or by proxy, at such meeting, or voting on such poll, should be entitled in respect of shares in the company other than founders' shares. The holders of founders' shares were not entitled to any dividend or otherwise to participate in the profits of the company, and on a winding-up were to be entitled to receive out of the surplus assets of the company remaining after payment off of the capital paid up in respect of the other shares in the company the amount paid up on the founders' shares.

EVE J.
1908
JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

The supreme control of the company's business and affairs was vested in a council consisting of not more than one hundred nor less than twenty members, each of whom was required to hold, either solely or jointly with others, one founders' share.

The company was formed in pursuance of a resolution passed at the Zionist Congress held at Basle in 1898. The Zionist Congresses are meetings which take place periodically of persons interested in the movement known as Zionism, which has for its aim the establishment of a publicly and legally secured home in Palestine for the Jewish people. The persons who take part in the Zionist Congresses are delegates from organizations of Zionists in various parts of the world. The company (as was stated in its prospectus) was not promoted for the sole purposes of making large profits or as an ordinary dividend-earning concern, but was intended to be the financial instrument to carry out the practical objects of Zionism.

The memorandum of association of the company as registered was originally settled under the directions of a committee of the Zionist Congress, and since the incorporation of the company questions had from time to time been raised at meetings of the Zionist Congress and of the company as to whether the memorandum of association did not extend beyond the real intentions of its original framers in so far as it authorized colonization schemes in parts of the world outside the more restricted area consisting of Palestine, Syria, any other parts of Turkey in Asia, the peninsula of Sinai, and the island of Cyprus, and as to whether the memorandum of association ought not to be restricted with the object of confining the company's colonization scheme to the prescribed region.

By special resolution of the company duly passed and confirmed at extraordinary general meetings of the company held on August 29 and September 18, 1906, it was resolved that the provisions of the company's memorandum of association with respect to the objects of the company be altered so as to restrict the operations of the company to the restricted area. This was a petition praying confirmation by the Court of the special resolution.

The company had never issued any debentures or debenture stock, and the interests of creditors were not in any way affected by the proposed alteration.

The voting at the meetings passing the special resolution and the subsequent history of the proceedings upon the petition sufficiently appear from his Lordship's judgment.

Upjohn, K.C., and *Clauson*, for the petitioners. In cases of this character the Court will see that the shareholders have a fair opportunity of knowing what the proposed alteration is and of expressing their views upon it. The three matters to be considered are (1.) that nothing unfair is done to the minority so that they are forced to remain in an undertaking substantially different from that in which they originally embarked; (2.) the position of the creditors; and (3.) the position of the public. Subject to those three considerations, the principle is that the memorandum of association of a company may be amended in the manner in which the statutory majority has resolved: Buckley on Companies Acts, 8th ed. pp. 706, 708. There is no reported decision under sub-s. 5 (*e*) of s. 1 of the Companies (Memorandum of Association) Act, 1890. In this case the objects do not appeal to the class to which they were intended to appeal, and they are opposed to the views of those who formed the company and of those who have joined or may join it. There is nothing in the proposed alteration unfair to the minority, and since the majority of those in favour of the alteration are in the proportion of five to one, we submit that the Court ought to confirm the resolution.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for shareholders in support of the petition.

Bentwich, for English shareholders in support.

Jessel, K.C., and *Israel*, for shareholders who opposed the petition. Notwithstanding that the majority of the shareholders who voted—and they were a very small proportion of the total number—supported the modification, the petitioners have not brought their case within the Act. The proposed alteration in the memorandum of association is a vital and fundamental one and will destroy an object essential to the company's existence,

EVE J.
1908
JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

and a fundamental alteration of such a nature is not within the contemplation of the Act: *In re Cyclists' Touring Club* (1); *In re Bernicia Steamship, Ld.* (2) We submit that sub-s. 5 (*e*) of s. 1 of the Act must be taken as contemplating matters of detail only, and not the vital objects of the company.

If, however, the case is within the Act, then the jurisdiction of the Court is discretionary, and we submit that having regard to the circumstances the Court will not exercise its discretion in favour of the petitioners. Before confirming the resolution the Court ought to be satisfied that the proposed alteration is in the interests of the members generally, including those who oppose, and that the vote at the meetings really expresses the views of the company as a whole: *In re Cyclists' Touring Club.* (1) The proposed change cannot be for the benefit of the shareholders as a whole, for it is admitted that colonization in Palestine is not possible at present, and in the meantime the wider powers may help towards the attainment of the ultimate goal of a home in Palestine and may afford immediate amelioration of the condition of oppressed Jews. The wider powers are not necessarily exercisable, but a restriction of them would deprive the company of a useful means towards the desired end. Moreover, the present majority may not be a permanent one, for the views of the minority may be adopted ultimately by all the members of the company. Further, the vote is not representative, as more than three-fourths of the members have not voted at all.

The Court cannot relieve itself of its responsibilities by directing advertisement, but must discharge the duty thrown upon it by the Act of Parliament of examining each case with care, and will not necessarily act upon the views of a majority of the shareholders: *In re Governments Stock Investment Co.* (3) If the Court does sanction the alteration, its sanction ought to be conditional upon a change in the company's name: *In re Indian Mechanical Gold Extracting Co.* (4); *In re Egyptian Delta Land and Investment Co.* (5)

(1) [1907] 1 Ch. 269, 273.
(2) [1900] W. N. 24.
(3) [1891] 1 Ch. 649, 656.
(4) [1891] 3 Ch. 538.
(5) [1907] W. N. 16.

I. Zangwill, in person, opposed the petition as a shareholder in the company.

Upjohn, K.C., in reply.

Cur. adv. vult.

May 4. EVE J. This is a petition by the Jewish Colonial Trust, Limited, praying the confirmation by the Court of a special resolution altering the provisions of the company's memorandum of association with respect to the objects of the company.

The special resolution was passed and confirmed on August 29 and September 18, 1906, and the petition is presented under the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62).

Inasmuch as it has been contended that the alteration purporting to have been made by the special resolution is one which the Court has no jurisdiction to confirm, and alternatively that it is one which the Court, if it has jurisdiction, ought in the exercise of its discretion to decline to confirm, I think it is well to express my views as to the scope of the statute, and the principles to be adopted in applying its provisions, before I deal with the particular facts of this case.

Joint stock companies, as we have been reminded by a judgment of the Court of Appeal delivered within the last few weeks (1), are the creatures of statute, and by the statute to which they owe their being they must be bound. Under that statute (the Act of 1862) the incorporation of the company is effected by the registration of a memorandum of association, and by s. 8 the memorandum of a company limited by shares must contain the following five things:—" (1.) The name of the proposed company, with the addition of the word 'limited' as the last word in such name: (2.) the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate: (3.) the objects for which the proposed company is to be established: (4.) a declaration that the liability of the members is limited: (5.) the amount of capital with which

(1) *Bisgood* v. *Henderson's Transvaal Estates, Ld.*, [1908] 1 Ch. 743.

EVE J.
1908
JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

the company proposes to be registered divided into shares of a certain fixed amount."

By ss. 12 and 13 statutory power is conferred upon the company to modify or alter its memorandum in certain specified respects and in those only. The sections are as follows. Sect. 12.: "Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." Then, by s. 13, "any company under this Act, with the sanction of a special resolution of the company passed in manner hereinafter mentioned, and with the approval of the Board of Trade testified in writing" (and so on), "may change its name. . . . ."

The rapid development of joint stock enterprise which followed upon the passing of the Act of 1862, coupled with certain untoward events calculated to accentuate the financial risks to which investors holding shares with a large unpaid liability were exposed, led to the Legislature introducing into the Act of 1867 a series of sections conferring upon a company limited by shares a qualified further power so far to modify the conditions contained in its memorandum as to reduce its capital. The qualifications to which the exercise of this new statutory power was subjected were, in addition to one or two matters of procedure with which I need not deal, first, that the company's regulations should expressly authorize its exercise, and, secondly, that the resolution exercising the power should have no effective operation until the Court had confirmed the reduction thereby contemplated. Sect. 11 of the Act of 1867, which imposes the condition of obtaining confirmation by the Court, is in these terms: "A company which has passed a special resolution for reducing its capital, may apply to the Court by petition for an order

confirming the reduction, and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit."

I read that section because it will be seen in a few minutes that its essential provisions are to a large extent incorporated in the Act of 1890, with which this application is more directly concerned. Then followed the Act of 1877, which merely extended the operation of the Act of 1867 so as to include within the power to reduce capital which had already been paid up. I need not stop to examine its provisions. From 1877 to 1890 a company limited by shares had, therefore, under the combined effect of the statutes of 1862, 1867, and 1877, and subject to the statutory conditions thereby imposed, power to modify its memorandum by changing its name, and by increasing or reducing, consolidating or dividing, its share capital, but it had no power in any way to modify or alter so much of its memorandum as defined "the objects for which" it had been established. During the period to which I have referred, experience shewed that commercial undertakings, and more especially those which had been incorporated at a time when it was not the practice to enumerate in great detail the objects with which the company had been established, were often seriously hampered in their business by the absence of any power to extend or alter the objects clause in the memorandum, and many a sound and prosperous company, in order to avail itself of the advantages of new scientific discoveries, or to carry its trade into new quarters of the globe, had to resort to Parliament to obtain statutory sanction to the new departure, always a costly experiment, or, alternatively, to undergo the inconvenience and expense of a reconstruction. Under these circumstances it was generally felt that a power to modify the objects clause of the memorandum within reasonable limits ought and might safely be conferred on the company, and in consequence the Act of 1890 came to be passed.

EVE J.
1908
JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

I have dealt with the matter in detail because it seems to me that the Act of 1890 was the logical conclusion at which legislation on the subject was bound to arrive sooner or later. Legislative powers to increase and reduce capital necessarily involved considerations relating to the expansion or contraction of the company's business, and to allow the company to decide for itself the amount of capital from time to time to be employed in its business, and at the same time to deny it all power to extend the business outside the strict limits originally laid down, involved an unnecessarily restrictive condition and a somewhat illogical exception to the power to modify the memorandum.

Turning now to the Act of 1890, by s. 1, sub-s. 1, it confers upon a company registered under the Acts 1862 to 1886 a limited power to alter the provisions of its memorandum of association with respect to the objects of the company. The power to alter is limited to such alterations as may be necessary for the purpose of enabling the company (sub-s. 5) "(*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement."

The Act further provides that no such alteration shall take effect until confirmed by the Court on petition. Sub-s. 5 of s. 1 shews clearly the test, and as I think the only test, which is to be applied for determining the question of jurisdiction. If it appears that the alteration is one required in order to enable the company to do any one of the five things above enumerated, then the Court has jurisdiction to confirm it wholly or in part. If, on the other hand, it is not required for any one of such purposes, then it is outside the Act altogether and the Court has no jurisdiction to confirm. Passing from this, and assuming that the alteration is within the Act, it is necessary in the next place to consider the statutory restrictions imposed upon the Court in the exercise of its discretion. These are enumerated in sub-ss. 2, 3, and 4 of s. 1 of the Act. Sub-ss. 2 and 3 are as follows:—Sub-s. 2: "Before

confirming any such alteration the Court must be satisfied (*a*) that sufficient notice has been given to every holder of debentures or debenture stock of the company, and any person or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and (*b*) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court. Provided that the Court may, in the case of any person or class of persons, for special reasons, dispense with the notice required by this section." Sub-s. 3: "An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court seems fit, and the Court may make such orders as to costs as it deems proper."

Turning back to s. 11 of the Act of 1867, it will be seen that these sub-sections reproduce almost in identical words the terms of that section, and inasmuch as the scope of the last-mentioned section has been authoritatively settled by the House of Lords, this similarity of legislative requirement is of some importance. Sub-s. 4, so far as it is material, is as follows: "The Court shall, in exercising its discretion under this Act, have regard to the rights and interests of the members of the company, or of any class of those members, as well as to the rights and interests of the creditors."

Upon the authorities to which I am about to refer, I am of opinion that these provisions of sub-s. 4 only express what the House of Lords has held to be implied in the case of an application to confirm a reduction of capital under the Acts of 1867 and 1877. In *British and American Trustee and Finance Corporation* v. *Couper* (1) a scheme of reduction was put forward for confirmation by the Court under which the shares of one class of shareholders were to be cancelled, the shareholders withdrawing from the company and receiving in exchange for their shares certain of the assets of the company. The creditors of the company either were paid or assented to the arrangement, and when,

(1) [1894] A. C. 399, 406, 411.

EVE J.
1908
JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

therefore, the petition for confirmation came on to be heard, the interests of the shareholders alone had to be considered. The petition being opposed, North J. and the Court of Appeal dismissed it. These decisions were reversed in the House of Lords, and Lord Herschell, in moving that the appeal be allowed, after pointing out that neither the statute of 1867 nor that of 1877 prescribes the manner in which the reduction of capital is to be effected, and that there is no limitation of the power of the Court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured, proceeds as follows. He says: "I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and, if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly safeguarded by this: that the decision of the majority can only prevail if it be confirmed by the Court. This is a complete answer to the argument, ably urged by Mr. Romer at the bar, that if all the shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to those of the majority." Then he goes on: "There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinised by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it."

Lord Macnaghten gives expression to the same view in the following words. He says: "The Companies Act, 1867, declares that any company limited by shares may by special resolution so far modify the conditions contained in its memorandum, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital. The power

is general. The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied. The public, the shareholders, and every class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect, though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner, and the company as it were makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free."

In the case of *Poole* v. *National Bank of China, Ld.* (1) Lord Macnaghten cites the foregoing observations and states that, speaking for himself, he sees no reason to alter or modify them, and then, dealing with the particular case then before the House, he says: "In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions, therefore, to be considered are these: (1.) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? and (2.) Is the reduction fair and equitable as between the different classes of shareholders?"

Lord Loreburn L.C. at the commencement of his speech says: "The appellants represent a very small proportion of the holders of founders' shares. But if this resolution is in fact unfair, even a few opponents will prevail. The only question is whether it is unfair; for the contention that it contravenes a bargain contained in the memorandum and articles of association cannot be made good, and it is no part of the business of a Court of justice to

(1) [1907] A. C. 229, 236, 239.

EVE J. 1908

JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

determine the wisdom of a course adopted by a company in the management of its own affairs."

I think, therefore, I am right in saying that there is nothing in the express words of sub-s. 4 of s. 1 of the Act of 1890 which is not implied by s. 11 of the Act of 1867, and, applying the principles which have been laid down for the guidance of the Court in dealing with applications under the earlier Act, I am not called upon in exercising my discretion to consider the wisdom of the proposed alteration. All I have to decide is whether it is unfair to any of the members, or, adapting Lord Macnaghten's query to the present case, I have to ask myself, is the alteration fair and equitable as between the two classes of shareholders? The result is, of course, that I must disregard all those parts of the evidence and of the arguments which have been addressed to the point whether it is desirable for the company to make the alteration.

Turning now to the particular facts of the present case, and bearing the foregoing principles in mind, I find that the company was incorporated on March 20, 1899, and that the first two objects for which it was established are thus stated in the memorandum of association:—"(1.) To promote, develop, work, and carry on industries, undertakings and colonization schemes in Palestine, in Syria, and in any other part of the world in any manner which may, in the opinion of the council for the time being of the company as defined by its original articles of association (hereinafter called the 'council'), be to the interest of the Jewish race in any country or place. (2.) To promote, develop, work, and carry on emigration or immigration from or into any country or countries into or from any other country or countries in any manner which the council may deem beneficial to the Jewish race in any country or place. And in particular to promote, develop, work, and carry on immigration of persons of the Jewish race into Syria, Palestine, and other countries in the East."

The special resolution of which confirmation is sought by the petition would modify those two clauses by making them read as follows: "(1.) To promote, develop, work, and carry on industries, undertakings, and colonization schemes in the prescribed region

(which expression shall in this memorandum mean Palestine, Syria, any other parts of Turkey in Asia, the peninsula of Sinai, and the island of Cyprus) or any part thereof. (2.) To promote, develop, work, and carry on emigration from any country or countries to the prescribed region or any part thereof in any manner which the council may deem beneficial to the Jewish race in any country or place."

In other words, the company proposes to eliminate from its objects the promotion, development, working, and carrying on of industries, undertakings, and colonization and emigration schemes in any part of the world outside Palestine, Syria, or other parts of Turkey in Asia, the peninsula of Sinai, and the island of Cyprus. Is it possible to deny that this is an abandonment of some of the objects specified in the company's memorandum? I think not; and the alteration proposed being one that is required in order to enable the company to abandon these objects, I cannot accept the view that the Court has no jurisdiction to confirm the resolution. On the contrary, I think the position is brought exactly within the express terms of the section, and I certainly do not feel at liberty, as I was invited by one of the respondents to do, to differentiate between the relative importance of the company's objects and to hold that the statutory power to modify does not extend to objects which in the course of the argument were spoken of as of a fundamental character.

I hold, therefore, that the alteration is one that the Court has jurisdiction to confirm. This being so, it is necessary for me to state the material facts which I have to consider in determining in what manner the discretionary power of the Court ought to be exercised.

As I have already stated, the company was incorporated in March, 1899, and it was no doubt brought into existence as an instrument calculated and intended to promote the ultimate realization of the Jewish aspiration of a return of the Jews to Palestine, there to find "a publicly and legally assured home." The extremely wide powers conferred upon the company by clause 3 of its memorandum of association are subject to certain provisoes by way of limitation contained in the same clause, and in particular to one providing that all the powers shall be

EVE J.
1908
JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

exercised in such a manner as in the opinion of the council shall tend primarily to the creation of a legally assured home in Palestine for the Jewish people, or shall be otherwise advantageous to people of the Jewish race, either generally or in any particular country or place.

The capital of the company is 2,000,000*l.* divided into 1*l.* shares, of which 100 are called "founders' shares"; 1,999,900 are called ordinary shares, and by the memorandum it is stipulated that the holders of the founders' shares shall in respect of such shares be collectively entitled at every general meeting of the company or on any poll to so many votes as shall be equal to the aggregate number of the votes to which all the persons or corporations present either personally or by proxy at such meeting or voting on such poll shall be entitled in respect of shares in the company other than founders' shares. By its constitution the company has power to issue share warrants in respect of fully-paid shares, and the supreme control of its business and affairs is vested in a council consisting of not more than one hundred nor less than twenty members, each of whom must hold, either solely or jointly with others, one founders' share. Article 89 enumerates the events in which the office of a councillor is to be vacated, but, subject to the provisions of that article, every councillor holds office during his life—every vacancy on the council is filled by the council if and when it shall think fit so to do. By the combined effect of articles 66 and 152 notices of meetings are served upon the members by advertisement in such newspapers as shall from time to time be determined by the council. Upon its incorporation the company issued a prospectus inviting applications for all the 1,999,900 ordinary shares. It contained the following statements with reference to the founders' shares. On page 1: "The founders' shares will be vested in the council of the company or their nominees and can only be transferred with the approval of the council. They will not confer any right to participate in the profits of the company." And on page 2: "The founders' shares will be held jointly by members of the council and by such other persons (not exceeding twenty in number) as may from time to time be nominated by the council on account of

services rendered either to Zionism or to the company. The founders' shares will not entitle their holders to receive any dividend or share of profits; but (except as mentioned below) the holders of the founders' shares will at any general meeting have collectively an equality of votes with the other shareholders present personally or by proxy at such meeting, and it is solely for the purpose of securing this voting power, and to give the council (as the representatives of the Zionist organization throughout the world) a legal control, as far as practicable, over the management of the company, that the founders' shares have been created."

The arrangements referred to in these paragraphs have been strictly adhered to, and all the founders' shares are to-day held by members of the council upon trusts which place the control of the founders' shares in the council, and are so framed as to prevent the founders' shares from being held by any persons who are not members of the committee of the Zionist Congress, the body which was directly responsible for the formation of the company. Of the ordinary shares 253,265 have been issued and are fully paid up. About one-third of this number are represented by share warrants to bearer, and the contributories are believed to number about 130,000. I am quoting from the joint affidavit of the chairman of the council and the secretary of the company filed on April 3, 1907. From subsequent affidavits it appears that the large majority of the contributories reside in Russia, and that the minority are to be found dispersed all over the continent of Europe, and in Canada, Australia, South Africa, and the United States and South America.

At an early date in the company's history attention was directed to the point that the company's powers were not restricted to the promotion and development of colonization schemes in that part of the world towards which alone the Jewish race was setting its face, and at the first Zionist Congress held after the incorporation of the company and at several subsequent congresses resolutions were discussed and passed with a view to obtaining such modifications of the company's powers as were necessary to restrict its operations to the Orient, and preferably

EVE J. 1908 JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

Palestine and Syria. This it was contended was the true and only aim of Zionism, and a body incorporated to promote Zionism pure and simple could not consistently employ its forces in settling any of the Jewish people elsewhere than in the Promised Land.

As a matter of fact the company never has availed itself of the extended powers conferred upon it to carry on its operations outside what has been referred to in the course of these proceedings as the restricted area, and no part of its capital is invested in any undertaking carrying on business outside Palestine, but they who have opposed and who still oppose the curtailment of the company's powers insist that the wider powers may prove to be valuable aids to the attainment of the ultimate goal of a home in Palestine, and in the meantime will afford opportunities for the immediate amelioration of the condition of oppressed Jews in Russia and other parts of Eastern Europe. They urge that, while the possession of the powers does not necessarily involve the exercise of them, the withdrawal of them would for all time preclude the company from availing itself of methods ancillary to and helpful towards its main object.

Such being the position of affairs, extraordinary general meetings of the company were held on August 29 and September 18, 1906, whereat a special resolution was passed and confirmed modifying the memorandum by limiting the sphere of the company's operations to "Palestine, Syria, and other parts of Turkey in Asia, the peninsula of Sinai, and the island of Cyprus." This is the modification which the Court is now asked to confirm. I need not read the resolution; it is set out in extenso in paragraph 11 of the petition, and its effect is such as I have already indicated.

The meetings of August 29 and September 18 were convened by advertisements in accordance with the company's articles. At each meeting a poll was taken. At the former 5185 votes were given in respect of ordinary shares, of which 4488 were in support of and 697 were against the resolution; at the second meeting 4176 votes were given in respect of ordinary shares, of which all but two were in support of the resolution.

At each meeting all the votes upon the founders' shares, aggregating 5185 at the first and 4176 at the second meeting, were given in support of the resolution.

Upon the presentation of the petition on March 17, 1907, evidence being filed shewing that the company had never issued or agreed to issue any debentures or debenture stock, that its financial condition was sound, and that the proposed alteration could not affect the creditors, an order was made directing the petition to be set down for hearing on July 9, 1907, and that notice of the presentation of the petition and of the date fixed for hearing should be advertised as therein mentioned. The petition duly came on to be heard, and the attention of the Court being called to the very wide area over which the ordinary shareholders of the company were scattered, to the small number who had recorded their votes, and to the importance attached to the question in issue by the Jewish community, the learned judge, after some discussion, ordered the petition to stand over until April 7 in this year, and in the meantime he directed advertisements to be inserted in a number of papers circulating amongst the Jewish race in various parts of the world, and, as I understand, he approved a form of advertisement which invited the shareholders to communicate their assent to or dissent from the proposed alterations. The company has filed evidence shewing exactly what has been done to carry out the judge's directions, and I accept and adopt the view that the council has done everything in its power to give effect to these directions and to ascertain by the means therein indicated the views of the shareholders at large. The advertisement inserted in the various countries and languages is in the following terms. I am reading it in English from the *Jewish Chronicle* of October 4, 1907. [His Lordship read the advertisement, and continued:—] The result of the advertisements is this. Replies have been received from 18,493 shareholders, holding 59,543 shares, and of these 16,006 shareholders, holding 50,117 shares, support, and 2487, holding 9426 shares, oppose the alteration. The resolution, therefore, is supported by a majority of five to one, or thereabouts, of those who have voted; but, on the other hand, the vast majority of the shareholders, representing over

EVE J. 1908 — JEWISH COLONIAL TRUST (JUEDISCHE COLONIAL-BANK), LIMITED, *In re.*

three-fourths of the share capital, have made no response and given no indication of their wishes.

At the hearing the petition has been vigorously opposed on behalf of the minority, partly upon grounds of expediency and the like—which, in view of what I have already stated, I hold myself disentitled to consider—partly on the ground that the real opinion of the shareholders has not been and really cannot be ascertained, and partly again on the ground that it would be unfair and inequitable to deprive the minority once and for all of all opportunity of getting the company to exercise powers which it is frankly admitted must remain dormant so long as the council remains of its present opinion in regard to them. The last two grounds of opposition very largely overlap. The minority are entitled to point to the absentee shareholders as constituting the body which is open to conviction and which is quite as likely to adopt their views as it is to adopt those of the present council. "Either" (they say) "that body has not been reached by the advertisements, in which case the Court is deciding in the absence of over three-fourths of the shareholders, or, if it has been reached, it has shewn itself so apathetic as to evidence a mind open to conviction, and in this latter alternative we ask not to be deprived of the chance of bringing about that conviction." I think these arguments ought to prevail. The council of the company, by reason of the regulations as to the founders' shares and under the trusts upon which these shares are held, have it in their power, so long as they are so minded, to restrict the operations of the company in the manner and to the extent in and to which they are now confined, and as they are a co-optative body, the members of which are elected for their lives, it is quite possible that the extended powers of the company, now dormant, will never be called into activity. But although the Court cannot, and indeed would not wish to, control this state of things, it is a very different thing where it is appealed to to take a step the effect of which will be to secure its permanency, whatever be the opinion of the majority of the shareholders for the time being and whatever be the political exigencies affecting the prosperity—possibly in some parts of the world the very existence—of a great people.

I think if I were to sanction these alterations I should be doing very little for those who advocate them and inflicting an unfair restraint—possibly an injustice—on those who oppose them, and accordingly I dismiss the petition, and I order the company to pay the costs of those contributories who have appeared and opposed the petition.

Solicitors: *Lewis & Yglesias; Emanuel, Round & Nathan; Adler & Perowne.*

R. M.

In re ATKINSON.
PROCTOR *v.* ATKINSON.

[1902 A. 186.]

Administration—Real Assets—Devise on Trust—Alienation by "Devisee"—Mortgage of Equitable Estate—Purchaser for Value without Notice—Bona fide Alienation—Priority over Creditor of Testator—Debts Recovery Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47), *ss.* 6, 8—*Administration of Estates Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 104).

An equitable tenant for life is a "devisee" within the meaning of ss. 6 and 8 of the Debts Recovery Act, 1830, and consequently a bona fide alienation by such a devisee before action brought will be protected, there being no difference for this purpose between the alienee of an equitable and the alienee of a legal interest.

Dictum of Lord Chelmsford L.C. in *Coope* v. *Cresswell*, (1866) L. R. 2 Ch. 112, 122, explained and adopted.

British Mutual Investment Co. v. *Smart*, (1875) L. R. 10 Ch. 567, and *In re Hedgely*, (1886) 34 Ch. D. 379, examined and applied.

THE only question argued upon this appeal was whether a mortgage by an equitable devisee for life of his life interest was a bona fide alienation of the land devised within ss. 6 and 8 of the Debts Recovery Act, 1830, which would prevent the creditors of his testator from enforcing their claim against such estate in the hands of the alienee. The facts, so far as material, were as follows:—

By his will, dated January 25, 1877, Josias Atkinson devised all the freehold and copyhold messuages, lands, tenements, and hereditaments to which he might be entitled at his decease unto

C. A. 1908

ATKINSON, *In re.* PROCTOR *v.* ATKINSON.

and to the use of John Hartley and John Lister, their heirs and assigns, in trust for his nephew William Thomas Atkinson and his assigns during his life, and after his decease in trust for the first and any other son successively, according to seniority of birth, of the said William Thomas Atkinson and the heirs male of the body of each such son, with divers equitable remainders over. The testator then charged all his lands, tenements, and hereditaments in the county of York with the payment of so much of his debts and legacies as his personal estate might fall short of discharging.

In May, 1884, the testator died seised of estates in Yorkshire and Norfolk. The Yorkshire estate was mortgaged; the Norfolk estates were not then incumbered. The testator's personal estate was insufficient for the payment of his debts.

By an indenture of June 6, 1885, William Thomas Atkinson mortgaged his life interest in the Norfolk estates to one Thomas Parkinson Brown to secure 1000*l.* and interest.

In July, 1890, Thomas Parkinson Brown obtained a foreclosure order against William Thomas Atkinson; and in 1893 entered into possession and receipt of the rents and profits of the lands comprised in the said indenture of mortgage, and continued in possession until his death in June, 1905.

On March 24, 1902, the usual judgment for the administration of the real and personal estate of the testator Josias Atkinson was made in the above action, which was brought by a creditor on behalf of himself and all other creditors of the testator, claiming amongst other things that a sufficient part of the real estate to make good the deficiency of the personal estate might be sold.

In May, 1907, the executors of the mortgagee, Thomas Parkinson Brown, who had been served with notice of the order for administration of March 24, 1902, took out a summons in the action asking for a declaration that the plaintiff and all other the creditors of the testator were not entitled to enforce their claims against the Norfolk estates devised by the testator to William Thomas Atkinson for life, or against the proceeds of sale thereof, so far as concerned, or so as to affect, the life interest therein of the said William Thomas Atkinson.

Joyce J. held that there had been no such alienation within s. 6 of the Debts Recovery Act, 1830, as would prevent the creditors from enforcing their claim against the Norfolk estates. (1)

The executors of the mortgagee of the life interest appealed.

Ingpen, K.C., and *Waggett*, for the appellants. The effect of the Debts Recovery Act, 1830, and the Administration of Estates Act, 1833, is well summarized by Lord Langdale in *Richardson* v. *Horton*. (2) It is admitted that the decision of Kindersley V.-C. in *Coope* v. *Cresswell* (3), upon which Joyce J. decided this question, is directly in point and against the appellants, but that decision was not accepted by Lord Chelmsford on appeal (4) and must now be taken to be overruled. From the remarks of Lord Chelmsford in *Coope* v. *Cresswell* (4), and the judgments of James and Mellish L.JJ. in *British Mutual Investment Co.* v. *Smart* (5), it is clear that an equitable tenant for life is a "devisee" within the meaning of ss. 6 and 8 of the Debts Recovery Act, 1830; and consequently a bona fide alienation by such a devisee before action brought will be protected. For present purposes there is no difference between the case of the alienee of an equitable interest and the alienee of a legal interest. This view of the law must have been held by North J. in *In re Hedgely* (6), which again was a case of equitable interests. [*In re Moon* (7) and Williams on Executors, 9th ed. p. 1556, were also referred to.]

The result of these authorities is that the bona fide alienation before action brought of an equitable interest or estate is on the same footing as an alienation of a legal interest or estate: both are equally protected. The appellants are therefore entitled to the declaration asked for by this summons, and this appeal should be allowed.

Hughes, K.C., and *Stokes*, for the plaintiff in the action. The alienation that is protected by ss. 6 and 8 of the Debts Recovery Act, 1830, is an alienation by the "devisee," which means the

(1) [1908] W. N. 18.
(2) (1843) 7 Beav. 112, 123.
(3) (1866) L. R. 2 Eq. 106, 113.
(4) L. R. 2 Ch. 112, 122.
(5) L. R. 10 Ch. 567, 576, 579.
(6) 34 Ch. D. 379.
(7) [1907] 2 Ch. 304.

C. A. 1908 ATKINSON *In re.* PROCTOR *v.* ATKINSON.

legal devisee and not various persons having beneficial or equitable interests in estates under the will. If ss. 2, 3, 6, and 8 are read together it is clear the primary object of s. 8 was to enforce the liability for the testator's debts against the devisee, i.e. legal devisee, in the same way in which s. 6 enforced this liability against the lien. The decision of Kindersley V.-C. on this point in *Coope* v. *Cresswell* (1) is in no way impeached or affected by the observations of Lord Chelmsford when that case was before him on appeal. The dictum relied on by the appellants was not meant to apply to the case then under consideration, but to some other possible case, probably by way of illustration. This dictum and the decisions in *British Mutual Investment Co.* v. *Smart* (2) and *In re Hedgely* (3) only apply to devises where the testator only had an equitable estate to dispose of, and have no application to a case like the present, where the testator himself created the equitable estate or interest by his will. In *British Mutual Investment Co.* v. *Smart* (2) the only point under discussion was an equitable alienation by an equitable owner. Many difficulties must arise if the Court once gives up the simple proposition that in a case like this the trustees are the "devisees" of the land. In *In re Hedgely* (3) the question raised was whether it was possible to get at the life estate of the alienor, and the question now under consideration was not argued. The effect of s. 8 was to put the devisee, i.e. the trustee, in the same position as s. 6 placed the heir-at-law, with the result that there has been no such alienation of this life interest as will prevent the creditors from enforcing their claim against this equitable estate for life in the Norfolk estate. [*Heming* v. *Archer* (4) was also cited.]

MacSwinney, for the present trustees of the will and also as representing a possible remainderman, adopted the arguments and contention of the plaintiff.

COZENS-HARDY M.R., after stating the facts and nature of the present appeal, continued:—The question for our decision is, shortly, whether on an assignment of his interest by an equitable tenant for life, before any proceedings are taken in the Chancery

(1) L. R. 2 Eq. 106, 113.
(2) L. R. 10 Ch. 567.
(3) 34 Ch. D. 379.
(4) (1844) 7 Beav. 515.

Division to have the real estate of the testator applied as assets for the payment of his debts, the equitable assignee can be affected, or whether the rights of the creditors are not limited to the interest in the estate of all persons other than the equitable assignee for life? In order to arrive at a conclusion on this point it will be right that I should first of all refer to a few sections of the Acts which create the difficulty, and next to the decisions which seem to me to bind us to arrive at the conclusion at which I have arrived.

The first Act to which I will refer is the Debts Recovery Act, 1830, which is really in substance a re-enactment of the statute of 3 Will. & M. c. 14. That Act provided only for the case of persons who held a bond, covenant, or other specialty in which a testator or an ancestor bound himself and his heirs, and provided by s. 6 that in such a case the heirs should be liable and the land might be charged, but if the land was aliened then the heir was to be liable to the value of the land, "saving that the lands, tenements, and hereditaments, bona fide aliened before the action brought, shall not be liable to execution." All that was very plain sailing when you were dealing simply with the case of an heir who must take the whole interest of the ancestor. Then it was contemplated and provided by the Act that devisees as well as heirs should be liable, and by s. 8 it was provided: "That all and every the devisee and devisees made liable by this Act, shall be liable and chargeable in the same manner as the heir-at-law by force of this Act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought"; that is to say, if the land has not been aliened it will be got at in the hands of the devisee, but if it has been aliened before the action brought, the land is not to be liable to such execution, but the devisee will be liable and judgment may be obtained against him "to the value of the said lands" as if the same were his own proper debt or debts. The subsequent Act—the Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104)—which gave simple contract creditors substantially the same right as specialty creditors under the prior Act, need not really be referred to for the purpose of this discussion.

C. A. 1908

ATKINSON, *In re.* PROCTOR *v.* ATKINSON.

Cozens-Hardy M.R.

Now it is quite plain that the Debts Recovery Act, 1830, contemplated cases in which lands might be devised in strict settlement. Sect. 12 says so in terms, because it provides, "where any lands, tenements, or hereditaments hath been or shall be devised in settlement by any person or persons whose estate under this Act . . . . shall be liable to the payment of . . . . debts," that in such case the first tenant for life may, under the decree of the Court, convey the fee. It is therefore impossible seriously to suggest that the only "devisees" who are within the meaning of the Act are devisees to whom the whole estate and interest of the testator is devised in the same way as the heir who would necessarily take the whole interest.

But then the question arose (and it is the first question which faces one in this case), who are the devisees who by s. 2 and s. 6 of the Act are the persons in whose hands the land is liable, and who are made personally liable for the value of the lands aliened? On the one hand it is said that the only persons intended to be affected by these sections are the persons in whom the legal fee is vested; and on the other hand it is said that that cannot be the true view, but that the persons taking beneficially under the devise are the persons who are aimed at by this Act, and the only persons intended to be made liable as for their own debt to the value of that which has been aliened.

Taking the decisions in order of time, the matter came first before that very learned judge, Kindersley V.-C., in *Coope* v. *Cresswell* (1), who intimated his opinion in language that is perfectly clear. He says (2): "But it appears to me that the equitable tenant for life is not the devisee within the meaning of the statute of William and Mary. If an action were brought by specialty creditors under that statute to make the estates devised available, such action would be brought, not against the equitable tenant for life, but against the person to whom in the eyes of a Court of Law the estate is devised, namely, the devisee of the legal estate. And it appears to me impossible to hold that the alienation, which is only by the cestui que trust for life, is such an alienation as to destroy the remedy given to creditors by the statute of

(1) L. R. 2 Eq. 106.

(2) L. R. 2 Eq. 113, 114.

William and Mary." Now if that case had stood alone, and if the question had not been subsequently elaborately considered by the Court of Appeal, and also by North J., I should have felt great doubt whether we ought to depart from that view; but the question has not been left in that way, for it came on appeal in that very case before Lord Chelmsford, and although it is not altogether easy to comprehend accurately what his view was on all the points that arose in that case, I think his view was that the trustees, in whom the legal fee is vested, are the persons against whom the action ought to be brought; they will represent the estate, and a judgment against them will bind the estate in this sense, and in this sense only, that there will be an equitable right given against the estate by virtue of the judgment, and then the Court will have to say as between two equitable interests, namely, that created by the proceedings taken by creditors to enforce their remedies against the estate, and the other equitable interests created by alienation by the equitable tenant for life, which are to prevail; and his view was that if any beneficial interest in the estate had been bona fide aliened before action brought, the Court would, upon application being made to it, prevent, not the whole estate or the whole property, but the interest so aliened from being affected by the execution. If that view is right, of course the decision of Joyce J. is wrong, because his decision is directly contrary to that when he says that the right in equity which the creditors have obtained by this decree, which was subsequent in date to the equitable assignment, is really to take priority over the equitable assignment.

But the matter does not rest there. A few years afterwards the question again came before the Court of Appeal in *British Mutual Investment Co.* v. *Smart* (1). There the legal estate was in the trustee of the will of Robert Monkhouse Piper. The interests were equitable, and the question was whether an equitable mortgage by agreement for the deposit of deeds by equitable remainderman did, or did not, prevent the creditors from subsequently obtaining a charge on the estate as being assets of the deceased debtor, and it was held that it did. I think it is impossible to read the judgments of James and

(1) L. R. 10 Ch. 567.

C. A. 1908 ATKINSON, *In re.* PROCTOR *v.* ATKINSON. Cozens-Hardy M.R.

Mellish L.JJ. without seeing that they put the case upon grounds which are decisive of the present case, whether or not they be inconsistent with the view expressed by Kindersley V.-C. James L.J. says (1): "It simply is that the one man has a right to have an equitable execution against the estate of his debtor, in the same way as another creditor would have had a right to a legal execution. Then another creditor says, 'Before you applied for equitable execution, I had obtained an equitable alienation.' In my opinion that equitable alienation takes precedence of the equitable execution which the man was entitled to have by a suit in this Court. It appears to me that the plaintiff was, therefore, right in saying that he, the equitable alienee, has priority over the equitable judgment creditor, for that is really what it comes to." Mellish L.J. in his very clear judgment takes the same view, and particularly in a passage where he points out that both mortgagor and mortgagee have only equitable interests, and says (2): "I do not see how it is possible to hold that a Court of Equity will extend the charge of lands, tenements, and hereditaments to equitable lands, tenements, and hereditaments, and then at the same time exclude the proviso, that if that equitable interest has been bona fide parted with before action brought, that alienation shall prevail."

I think, therefore, on the authorities which I have referred to in the Court of Appeal, we are bound to hold that the right of the equitable tenant for life by way of assignment—the equitable assignee—is not affected by the proceedings instituted by the creditors in this suit.

Thus far I have rather assumed that the devisee under the Act must necessarily be the devisee of the legal estate, and not the beneficial devisee. In my view that is not correct. I think that the plain meaning of the Act must be this: Make the persons liable who alien property devised to the value of that which they alien. If that person is tenant for life, make him liable to the extent of the value of his life estate; if that person is a remainderman, make him liable to the value of his remainder. I cannot bring myself to think that those words extend to, and only extend to, the case of trustees who are really not concerned

(1) L. R. 10 Ch. 576. (2) L. R. 10 Ch. 579.

in any way with the aliening of the property, and whom it would be most cruel to render personally liable to a judgment for that which they have not realized by sale, but which they have simply conveyed over to persons beneficially entitled, and, so far as they knew, without any adverse claim at all.

That the view I have thus expressed was the view taken by North J. in *In re Hedgely* (1) is, I think, perfectly clear. The whole point there was whether the equitable devisee in remainder was liable for the value of that which she had alienated by her marriage settlement. That liability could only exist if she was a devisee within the meaning of the Act. North J. held that she was liable to the value of the whole estate, although, of course, she being a married woman restrained from anticipation, judgment could only go against her life interest. But whether the true view be that the devisees are only the legal devisees, or whether the true view be, as I incline to think, that the term includes the equitable devisees, in either view it seems to me the judgment of the learned judge in this case cannot be maintained, and that the appeal ought to be allowed.

I will say only a few words about Mr. MacSwinney's argument. There is nothing in the order which affects the remainderman, but I think it is perfectly clear that an alienation by a tenant for life in no way relieves the land in the hands of the remainderman from the liabilities that attached to it before. That was expressly asserted by Lord Chelmsford in *Coope* v. *Cresswell* (2), and apart from that any other view seems to me quite hopeless.

There is one other point which it is desired to keep open, and that is the question on the Statute of Limitations. Quite properly that has not been argued before us, because it is covered by the decision of this Court in the case of *In re Lacey.* (3) I only mention it in case the matter should go further, so that it may not be said the matter was not mentioned.

BUCKLEY L.J., after shortly stating the facts, continued :— The question to be determined involves a review of the sections

(1) 34 Ch. D. 379. (2) L. R. 2 Ch. 112.
(3) [1907] 1 Ch. 330.

C. A. 1908 — ATKINSON, *In re.* PROCTOR *v.* ATKINSON. — Buckley L.J.

of the Debts Recovery Act, 1830. It is a statute which is strangely expressed. It begins in s. 2 with a provision that for the protection of creditors all wills shall be deemed or taken as against creditors entitled under a bond, covenant, or specialty "to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding." When you come to read the statute further you find that this section means, not that the will shall be utterly void and of no effect, but that, to the extent and for the purposes and in the manner which the Act is going to work out, effect shall be given for the benefit of creditors to such rights as would have existed if the will had not been made. It is quite plain that the will is not to be of no effect, because the statute goes on to provide that the devisee shall come under liability in respect of his testator's debts, which, of course, supposes that he holds the character of devisee, and it goes on to contain provisions as to what is to take effect if the devisee has aliened the lands devised, with the result that under certain circumstances, but not under all circumstances, the alienee is defeated. The will, therefore, is not to be void, but by looking at the Act of Parliament you are to find out what is to be its effect when rights of creditors are in question. Quite shortly stated in my own words, what it comes to is this: the statute gives to the specialty creditor (because it is only with him this Act is dealing) the right to sue the heir and devisee as if they were, which they are not, debtors to the specialty creditor. Then it provides that the heir or devisee shall to the value of the lands be liable in respect of his testator's debts. Sect. 3 is the one which enables the specialty creditor to sue the heir and devisee. Then, passing over ss. 4 and 5 and coming to s. 6, that provides that where the heir-at-law sells the lands he is to be liable in an action of debt or covenant to the value of the lands sold, aliened, or made over; so that if he has sold he is personally liable to the value of the lands sold. That section ends with these words: "saving that the lands, tenements, and hereditaments, bona fide aliened before the action brought, shall not be liable to such execution." So that although you

can sue the heir and get judgment against the heir, and issue execution against the heir, you can only get execution to the value of the lands which he has sold, and the lands which he has bona fide sold before action brought are not liable and cannot be seized. Then s. 8 by referential words makes a similar provision in the case of devisees, but without working out how the case is to be dealt with when there are devisees of successive estates, a state of things which is clearly contemplated by s. 12.

The question which has been principally argued before us is whether the devisee mentioned in that Act of Parliament is confined to the legal devisee or extends to the person equitably entitled under the testator's devise. If there be a devise to A. in trust for B., is B., the equitable devisee, a devisee within the Act of Parliament? Without in the first instance looking at the authorities, it seems to me very extraordinary if B. were not. In the case which I put, A. of course gets nothing beneficially, but he may be liable notwithstanding under the Act of Parliament. The contention before us is that B. is not liable. Why not? B. is the person who has become beneficially entitled from the testator to the lands which ought primarily to go to pay the testator's debts, and I fail to see why, as a matter of good reason, the person who becomes beneficially entitled to the land, if he has taken the land and sold it, should not be personally liable in respect of the debt.

But there is authority upon this point. The passage on which the contention has mainly been founded are some words of Kindersley V.-C. in the case of *Coope* v. *Cresswell*. (1) If that case stood without any subsequent decision, I should hesitate much before saying I was unable to agree with anything Kindersley V.-C. had said. He has put it plainly in the passage I am going to read: "It appears to me that the equitable tenant for life is not the devisee within the meaning of the statute of William and Mary"; for my purpose I may substitute within the meaning of the Debts Recovery Act, 1830. "If an action were brought by specialty creditors under that statute to make the estates devised available, such action would be brought, not against the equitable tenant for life, but against the person to

(1) L. R. 2 Eq. 113.

C. A. 1908

ATKINSON, *In re.* PROCTOR *v.* ATKINSON.

Buckley L.J.

whom in the eyes of a Court of Law the estate is devised, namely, the devisee of the legal estate." From the latter sentence I express no dissent. I have no doubt you might sue the legal owner, probably joining the beneficial owner also, and you might get judgment if the estate were vested in the legal owner, and the property had not been aliened. I am not, however, able to agree that the equitable tenant for life is not a devisee within the meaning of the Act. I think he is. As I understand Lord Chelmsford on the appeal in that case, he intended so to say. I agree that, reading his language, it is difficult to say whether he was dealing solely with the case of an equitable estate devised by the testator, to the exclusion of the case of a legal estate in the testator devised by him to A. in trust for B. He is plainly including the case of a testator devising an equitable estate, but I am not at all satisfied that he was confining himself to that, and, if not, the words I am going to read cover the present case. He says (1): "Upon a judgment obtained against the trustees, execution would, of course, extend to the whole estate. But if any beneficial interest in it had been bona fide aliened before action brought, I think this Court would, upon application being made to it, prevent the interest so aliened from being affected by the execution." It appears to me plainly that there Lord Chelmsford is drawing a distinction between the trustees in whom the legal estate is vested under the dispositions made by the testator and the beneficial interest, which must mean a beneficial interest created by the testator in favour of persons for whom the trustee holds, and he says, if the beneficial interest has been aliened, that would prevent the interest aliened being affected by the execution; that is to say, that the disposition by the equitable owner will preclude the creditor from reaching the land. Of course that assumes that the alienor is a devisee within the Act of Parliament.

Subsequent judges have, I think, understood Lord Chelmsford in the way I have mentioned. The Master of the Rolls has referred to *British Mutual Investment Co.* v. *Smart.* (2) The equitable interest there dealt with was an equitable interest created by the testator. R. F. Piper and C. A. Piper were

(1) L. R. 2 Ch. 122.

(2) L. R. 10 Ch. 567.

persons for whom the trustee held upon trust under Robert Monkhouse Piper's will; and I find James L.J. using these words (1): "Then when it"—that is, the statute—"dealt with the real assets they were always subject to the proviso found in the statute of 3 & 4 Will. & M. c. 14, and afterwards repeated in 11 Geo. 4 & 1 Will. 4, c. 47; that is to say, that the alienation of the assets by the heir or devisee was to prevent the creditor from following those assets into the hands of the alienee, he being a bona fide alienee." Then, further down, he says: "It appears to me, following out the analogy and extending the remedy against equitable estates, that this Court ought to treat an equitable alienation as having exactly the same effect in this Court as a legal alienation would have." Mellish L.J. deals with that in two passages to which attention was called in the argument. The first is at the bottom of p. 578, where he says, "upon principle, even if a devisee had the legal estate devised to him," and so on; and the second on p. 579, where he says: "Applying the 6th section of 11 Geo. 4 & 1 Will. 4, c. 47, to that case, I do not see how it is possible to hold that a Court of Equity will extend the charge of lands, tenements, and hereditaments to equitable lands, tenements, and hereditaments, and then at the same time exclude the proviso, that if that equitable interest has been bona fide parted with before action brought, that alienation shall prevail." I think both James and Mellish L.JJ. meant that the alienation by the person in whom an equitable estate is vested by the devise of the testator is alienation by a devisee within the Act of Parliament.

The last case is the one before North J. of *In re Hedgely*. (2) I agree with what Mr. Hughes has said, that the point argued there is not the point arising for decision here; but it is impossible to sustain North J.'s decision except by assuming that he was proceeding upon the footing on which we are now deciding this case. *In re Hedgely* (2), again, was a case of equitable interests.

It seems to me, therefore, that on principle, and on the authorities, the alienation which has been made by the equitable tenant for life in favour of the mortgagees so passed the

(1) L. R. 10 Ch. 575. (2) 34 Ch. D. 379.

C. A. 1908

ATKINSON, *In re.* PROCTOR *v.* ATKINSON.

land to them as that in their hands the land was discharged from the testator's debts. Of course, it is quite another matter how the debts are to be recovered from those who aliened. For these reasons I think the appeal ought to be allowed.

KENNEDY L.J. I am entirely of the same opinion. The Master of the Rolls has expressed so fully my view that I desire only to add a few sentences to the statement and my concurrence.

The question is how far, if at all, can the interest which was aliened in this case to the mortgagees be affected in favour of creditors of the testator. I think that in any view of the statutory enactment the argument which has prevailed in the Court below is not the argument which should prevail here. If an equitable devisee is the devisee to whom the statute refers, and in reference to whom the proceedings by suit are contemplated by the third section of the Act, then it is quite clear that if he is to be sued he is, according to the view of Lord Chelmsford in interpreting the Act, and the view of James and Mellish L.JJ., protected so far as regards the safety of the interest which has been aliened. That interest cannot be touched, equity not allowing, if an application is made, the equitable interest which the alienee has got to be affected in favour of creditors whose rights as regards the property arise only upon the judgment having been given. If, on the other hand, the person who ought to be treated as the devisee, and ought to be sued, is the trustee of the interest which has been dealt with by the devisee, then it seems to me it is equally within the judgment of Lord Chelmsford, and within what I may call the reason of the case, that the alienee should be in no worse position. The trustee has in fact been merely a formal party to the transaction, and if it is the policy of the law, and in accordance with the terms of the statute, that (as Lord Chelmsford says) if a beneficial interest has been bona fide aliened before action brought the Court of Equity would prevent the interest so aliened from being affected by the execution, the same principle applies to the case of a formal proceeding or suit against the trustee as to a case in which, if he may be treated as the devisee under the statute, an action

is brought directly against the beneficiary. I am of opinion that this appeal should be allowed.

C. A. 1908 ATKINSON, *In re.* PROCTOR *v.* ATKINSON.

Solicitors: *Biddle & Co., for Brown & Co., Skipton; Ridsdale & Son, for J. H. Vant, Settle.*

W. C. D.

CROYDON CORPORATION *v.* CROYDON RURAL DISTRICT COUNCIL.

C. A. 1908 *May* 19, 20; *June* 3.

[1906 C. 3249.]

Local Government — Rural Authority — Construction of Sewers — "Special Expenses" — Contributory Area — Rates — Judgment for Arrears of Rates — Retrospective Rate — Mandamus — Discretion — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 28, 229, 230.

Special expenses for drainage works were incurred by the plaintiffs upon terms the result of which was that money was due each year from the defendants to the plaintiffs, and the amount so due was recoverable by the defendants from three contributory parishes for whose benefit the special expenses were incurred. By mistake the plaintiffs did not for several years call upon the defendants to pay the full amount properly due, and less was paid till September, 1904. In April, 1905, the plaintiffs drew attention to the mistake and called upon the defendants to pay the balance due in respect of several previous years up to September, 1904, and to make payment for the future on a proper footing. The defendants paid on the lower scale till September, 1905 and thenceforward paid in full. They were unable to recover part of the arrears from the contributory parishes and declined to pay the arrears; whereupon the plaintiffs brought an action to recover the arrears and for a mandamus to enforce the levy of a rate to satisfy them. The defendants admitted that the plaintiffs were entitled to judgment for the arrears, but contended that a mandamus to enforce payment of a retrospective rate would be illegal:—

Held, varying the order of Neville J., [1908] 1 Ch. 222, that the Court had a discretion to grant a mandamus for enforcing the levying of a rate to meet obligations for special expenses of former years if the circumstances justified it; that there was no reason for granting a mandamus to enforce payment of the arrears up to 1904; but that, inasmuch as a demand was made and might have been complied with in the course of the current year 1904–5, a mandamus ought to be granted to enforce payment of the amount due for that period.

APPEAL from a decision of Neville J. (1)

Under the provisions of s. 28 of the Public Health Act, 1875,

(1) [1908] 1 Ch. 222.

C. A. 1908

CROYDON CORPORATION v. CROYDON RURAL COUNCIL.

the plaintiffs and defendants in January, 1900, entered into an agreement under which the plaintiffs were to construct sewers in their area, and the defendants were to construct sewers in the parish of Coulsdon, which was in their district, and the sewers in this parish, when constructed, were to be connected with the drainage system of the plaintiffs. The agreement further provided that the defendants should pay the plaintiffs for this user of their drainage system, so long as it should be continued, a yearly rent equal to from 6*d.* to 8*d.* in the pound on the rateable value for the time being of all property within the part of the parish of Coulsdon which should be liable to contribute to the rates for special expenses under the Sanitary Acts, and that this rent should be paid quarterly. At the same date the plaintiffs and defendants entered into similar agreements with respect to the parishes of Sanderstead and Beddington, both of which were in the defendants' district. The sewers were constructed in the three parishes and were connected with the drainage system of the plaintiffs in accordance with the agreements, and from April, 1901, to September, 1904, the defendants yearly paid the plaintiffs the amount of the rent demanded. Early in 1905 it was discovered that by a common mistake the rent demanded and paid during the period in question was only the amount calculated on the houses in the parishes actually connected with the drainage system of the plaintiffs instead of an amount calculated on the rateable value for the time being of all property within the said parishes liable to contribute to the rates for special expenses under the Sanitary Acts. On April 18, 1905, the plaintiffs wrote to the defendants pointing out the mistake and demanding payment of 2925*l.* 5*s.* 3*d.* due down to September 29, 1904, and payment in future on a proper footing. Negotiations ensued, and rent was paid on the old footing down to September 29, 1905, since which date it had been paid in full. In March, 1906, the defendants, having in their hands about 1000*l.* belonging to the three parishes and available for special expenses, paid that sum to the plaintiffs, who appropriated it towards satisfaction of the arrears due up to September 29, 1904, and thus reduced them to 1925*l.* 5*s.* 3*d.* With the view of spreading the payment of the balance of the arrears over several years, the defendants, under

ss. 229 and 230 of the Public Health Act, 1875, issued precepts to the overseers of the parishes of Coulsdon and Sanderstead respectively for special expenses for the half-year ending September 30, 1906, including 475*l.* in the case of Coulsdon and 75*l.* in the case of Sanderstead, to meet in part the arrears in question. The Sanderstead overseers refused to levy a rate for the 75*l.* on the ground that such rate would be retrospective and illegal. The Coulsdon overseers levied the rate, but on appeal to quarter sessions it was quashed on the same grounds on July 5, 1906. The defendants then, having no money available for payment of the arrears, refused to pay them. The plaintiffs thereupon, in October, 1906, commenced this action, and claimed judgment for the 1925*l.* 5*s.* 3*d.* and 2394*l.* 18*s.* which had accrued due between September, 1904, and September, 1905, together with 636*l.* for interest thereon at the rate of 5*l.* per cent. per annum from the respective dates when the several sums making up that aggregate sum ought to have been paid; and they also claimed a mandamus commanding the defendants to issue precepts to the overseers of the three parishes respectively for levying a rate sufficient to cover the amount of the judgment and costs.

The defendants by their defence did not admit that the arrears were due to the plaintiffs, but at the trial it was conceded that the plaintiffs were entitled to judgment for the full amount with interest as claimed. The right to a mandamus was disputed. There was evidence that to a large extent the present ratepayers in the plaintiffs' and defendants' districts were a different body of persons to the ratepayers during 1901 to 1905.

At the trial no distinction was suggested between the rent due before September 29, 1904, and that payable between September, 1904, and September, 1905. Neville J. gave judgment for the full amount claimed, but in the exercise of his discretion refused a mandamus. The costs of the action so far as it sought recovery of the debt were given to the plaintiffs, and so far as it asked for a mandamus to the defendants; one set of costs to be set off against the other.

The plaintiffs appealed.

It was stated that the costs of the action for recovery of the

C. A. 1908

CROYDON CORPORATION v. CROYDON RURAL COUNCIL.

debt amounted to 400*l.* and those of the claim for a mandamus to 127*l.*

Cozens-Hardy, for the appellants. The corporation is entitled to a mandamus under s. 25, sub-s. 8, of the Judicature Act, 1873, and Order LIII., which are in substance equivalent to the old practice under ss. 68-71 of the Common Law Procedure Act, 1854, and s. 32 of the Common Law Procedure Act, 1860.

Under ss. 229 and 230 of the Public Health Act, 1875, the maintenance and construction of these sewers were "special expenses" of the three parishes, which are "contributory places" within the meaning of s. 28 of the Act, and these "special expenses" are to be raised and paid by means of a contributory rate. On ss. 229 and 230 a rate to pay these special expenses is not in fact a retrospective rate. The expenses are not in fact "incurred," within s. 229, where the defendants, as here, contest liability, until judgment. The meaning of "incurred" is considered in *Ringland* v. *Lowndes*. (1) The amount and the liability to pay must be ascertained before expenses can be said to be "incurred." The period during which litigation is going on is not to be taken into account in calculating the period of six months during which the rate may be made retrospectively: *Jones* v. *Johnson* (2); *In re Bootle-cum-Linacre Overseers*. (3) The original claim for contribution is merged in the judgment, which forms a new point of departure; the judgment operates as a new debt, and a rate to satisfy it can be levied within six months from date of judgment: *Reg.* v. *Leigh Rural Council*. (4) This is no new principle, for it has been applied in numerous earlier cases which, though under different Acts, shew that it is the date of the judgment and not of the cause of action that is to be taken into account: *Reg.* v. *Rotherham Local Board* (5); *Swire* v. *Burley Local Board of Health* (6); *Reg.* v. *Burleigh Board of Health* (7); *Worthington* v. *Hulton* (8), approved incidentally in *Julius* v. *Bishop of*

(1) (1863) 15 C. B. (N.S.) 173, 200.
(2) (1852) 7 Ex. 452, 457.
(3) (1891) 7 Times L. R. 219.
(4) [1898] 1 Q. B. 836.
(5) (1858) 8 E. & B. 906.
(6) (1859) 23 J. P. 420.
(7) (1859) 1 L. T. 92.
(8) (1865) L. R. 1 Q. B. 63.

Oxford (1); *Easton & Co.* v. *Nar Valley Drainage Commissioners.* (2) In all those cases there had been judgment, and it was held that a start could be made from the judgment. In *Waddington* v. *London Union* (3), relied on by the defendants, there was no judgment. That case was altered by 22 & 23 Vict. c. 49, s. 6, which was passed to get over the difficulty caused by that decision, and after the passing of that Act a poor rate could be made for balances accrued due previously to the making of the rate. In *Reg.* v. *Bedlington Overseers* (4) the rate was levied as poor rate under a special Act of 1861. It cannot be that the liability to pay the rate is avoided altogether if the amount of the liability is not fixed in the same year, or the ratepayers dispute liability.

But even if the rate is retrospective, that fact does not necessarily make it illegal in the case of "special expenses"; this point was left open in *Reg.* v. *Leigh Rural Council.* (5) There is no general rule that retrospective rates are bad; a good deal must depend on the provisions of the Act under which the rate is made: *Harrison* v. *Stickney.* (6) Poor rate was, under 43 Eliz. c. 2, to be made weekly, and therefore it was not retrospective; but there is a difference between poor rate and a rate for "special expenses." In *Saul* v. *Wigton Rural Sanitary Authority* (7) the rate was in part bad, but one of the judges there forgot the fact that a poor rate to discharge past balances was allowed by 22 & 23 Vict. c. 49, s. 6. Accumulated balances were recovered in *Caistor Union* v. *North Kelsey Overseers.* (8) Rural district councils have all the powers, duties, and liabilities of former rural sanitary authorities under the Local Government Act, 1894, ss. 25 and 75, which incorporates the definitions in the Local Government Act, 1888; and s. 100 of that Act defines the powers, duties, and liabilities of the sanitary authority.

Sect. 6 of 22 & 23 Vict. c. 49 does apply to the present case, if not expressly, then by analogy. Sect. 4 has been held to apply to the case of a rural sanitary authority: *Rhodes* v. *Pateley*

(1) (1880) 5 App. Cas. 214, 243.
(2) (1892) 8 Times L. R. 649.
(3) (1858) E. B. & E. 370.
(4) (1884) 48 J. P. 486.
(5) [1898] 1 Q. B. 836.
(6) (1848) 2 H. L. C. 108, 125.
(7) (1886) 56 L. T. 438.
(8) (1890) 62 L. T. 731.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL.

Bridge Union (1); and s. 6, by analogy, applies so as to include carried over balances—*London Union* v. *Acocks* (2)—even though balances in part were not demanded for three years: *Caistor Union* v. *North Kelsey Overseers.* (3)

Even the rule that poor rate must not be retrospective has been held to be subject to necessary exceptions in particular circumstances: *Reg.* v. *Read.* (4) The general principle is, no doubt, that the ratepayers of to-day are not to be called on to pay the debts of ratepayers of previous years; but the principle is subject to exceptions according to circumstances, and in some cases by statutory provisions, e.g., s. 210 of the Public Health Act, 1875, and s. 144 of the Municipal Corporations Act, 1882. Prospective rates are in a similar position. There is no case which shews that a retrospective rate is bad if it is made as soon as the liability is ascertained.

At all events we are entitled to a mandamus in respect of the 2394*l.* accrued due between September, 1904, and September, 1905, for we demanded payment of that sum during the current year. There is a distinction between that claim and the claim for arrears up to September, 1904, for we did not ask for payment of the latter till after the year had expired. But we submit that we are entitled to a mandamus in respect of all the arrears. There has been no delay; no delay is pleaded; and the debt is now admitted.

At the trial we recovered judgment for interest on the whole sum claimed. That was recovered as damages, and we are entitled to a mandamus in respect of it. It is now admitted that the defendants are liable for 273*l.* for costs.

Macmorran, K.C., and *E. J. Naldrett*, for the Croydon Rural Council. The difficulty has been caused by a mistake which ought not to have occurred, but it is now too late to apply for a mandamus. When the corporation applied to us in April, 1905, for increased payments, precepts had already been issued for the half-year's rent up to September, 1905; so there is no distinction between that year and former years. We do not deny that the judgment is right, but we are not the rating authority, though we have to deal with the rating authority; so a mandamus

(1) (1884) 51 L. T. 235.
(2) (1860) 8 C. B. (N.S.) 760.
(3) 62 L. T. 731.
(4) (1849) 13 Q. B. 524, 534.

against us would be futile. It may be that if we had any property the plaintiffs might seize it. It has never been decided whether in that case the property could be redeemed out of the rates, but an order ought not to be made which cannot be enforced if the rates are not applicable for that purpose.

A creditor entitled to payment out of rates is bound to commence proceedings promptly, or he will lose his rights. It has always been taken that the rating period for this purpose is twelve months. It is true that in *Harrison* v. *Stickney* (1) it was said that there was no general rule of law which prohibited a retrospective rate and that the Court must look at the facts. But general district rates are within s. 210 of the Public Health Act, 1875, which has modified that principle so far as it affects urban authorities and fixed a retrospective limit of six months from the time when the rate is made : *Smith* v. *Southampton Corporation.* (2) The defendants are a rural authority within s. 230, and a rate to meet special expenses is to have all the incidents of poor rates except the purposes to which they are applicable; so it was not necessary to fix a limit of six months, for poor rate is payable weekly and not retrospectively. It has been held that that principle applies and that a retrospective rate for payment of arrears is illegal : *Reg.* v. *Bedlington Overseers* (3); *Saul* v. *Wigton Rural Sanitary Authority* (4) ; *Earl Jersey* v. *Uxbridge Rural Sanitary Authority* (5), before Vaughan Williams J. on October 3, 1890, and referred to in *Earl Jersey* v. *Uxbridge Rural Sanitary Authority* (6) ; *Reg.* v. *Rotherham Local Board.* (7) All the authorities relied on by the appellants refer to urban authorities within s. 210. Local authorities cannot evade the Act by ordering goods on long credit, for that is another form of borrowing and illegal. It is difficult to extract any principle from the cases. The expressions which support the appellants' contention are only dicta and ought not to be followed ; for instance the remarks in *Burland* v. *Kingston-upon-Hull Local Board* (8), *Worthington* v. *Hulton* (9), and *Reg.* v. *Leigh Rural Council.* (10)

(1) 2 H. L. C. 108.
(2) [1902] 2 K. B. 244, 253.
(3) 48 J. P. 486.
(4) 56 L. T. 438.
(5) Unreported.
(6) [1891] 3 Ch. 183.
(7) 8 E. & B. 906.
(8) (1862) 3 B. & S. 271.
(9) L. R. 1 Q. B. 63.
(10) [1898] 1 Q. B. 836.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL.

The expenses were incurred when the work was done. It has never been decided that a judgment is a novation of a debt. In this case there has been a mistake, and no blame attaches to anybody. There is no special reason why the present ratepayers should be called upon to pay debts which ought to have been paid by their predecessors, so we ask the Court not to exercise their discretion in favour of the appellants.

Cozens-Hardy, in reply, referred to *Midland Ry. Co.* v. *Edmonton Union* (1) and *West Ham Union* v. *Churchwardens, &c., of St. Matthew, Bethnal Green* (2), on the question of a mandamus to enforce payment of costs.

Cur. adv. vult.

June 3. The following written judgments were delivered :—

COZENS-HARDY M.R. It is a general principle of rating law that as far as possible the ratepayers of one year shall not be called upon to discharge obligations which ought to have been met by the ratepayers of a preceding year. In the language of Lord Abinger C.B. in *Woods* v. *Reed* (3), "The general inconvenience of retrospective rates has been long known and recognized in the Courts of law, on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors have had the whole benefit." But this principle, which is not an absolute rule of law, cannot be strictly adhered to under all circumstances. Some margin must be allowed. For example, the public body may honestly dispute the existence or the amount of an alleged debt, and, although the creditor may promptly commence an action, judgment may not be recovered for a long time. The difficulty has been met in particular cases by statute. A good instance of this is to be found in the Poor Law (Payment of Debts) Act, 1859. Another instance is found in s. 210 of the Public Health Act, 1875. Where, however, there is no express provision limiting the time within which a claim must be made by the creditor, the Courts have endeavoured to act upon the view that as far as possible the current year is the time within which a creditor shall assert his claim, unless there are

(1) [1895] A. C. 485. (2) [1896] A. C. 477.
(3) (1837) 2 M. & W. 777, 784.

circumstances which suffice to explain and justify his delay in bringing an action. If, however, such circumstances exist, a rate to meet the liability when ultimately ascertained is not illegal, and the Court in its discretion will grant a mandamus for enforcing the levy of a rate to meet the obligation thus ascertained. This seems to me to be the result of the decision of the Court of Queen's Bench in *Worthington* v. *Hulton* (1) and of this Court in *Reg.* v. *Leigh Rural Council* (2), although it may be true that the observations of A. L. Smith and Collins L.JJ. in that case were not necessary for the decision. In my opinion it would not be right for us to depart from the view which has doubtless been acted upon in many cases for nearly half a century, and it therefore only remains to consider whether the circumstances in the present case are such as to justify the Court in granting a mandamus.

Now the material facts may be shortly stated. The defendants are a rural authority to which s. 229 and the following sections of the Public Health Act, 1875, are applicable. Certain special expenses were incurred by the plaintiffs, the Corporation of Croydon, at the request of the defendants and upon the terms of certain agreements, the result of which was that money was due each year from the defendants to the plaintiffs, and the amount so due was recoverable by the defendants from the three contributory parishes for whose benefit the special expenses were incurred. Through some blunder or forgetfulness the plaintiffs did not call upon the defendants to pay the full amount properly due for several years, but on April 18, 1905, the plaintiffs drew attention to the mistake and called upon the defendants to pay the balance due in respect of several previous years up to September, 1904, and to make payments for the future on a proper footing. The defendants did not admit their liability before action, or in the pleadings in the action, but they paid 1000*l.* on account, and attempted, without success, to recover part of the sum due from one of the contributory parishes. In these circumstances the defendants admitted at the trial that the plaintiffs were creditors for the full amount claimed, but they stated that they had no money to pay, and argued that a rate to

(1) L. R. 1 Q. B. 63. (2) [1898] 1 Q. B. 836.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL. — Cozens-Hardy M.R.

raise these sums would be a retrospective rate, and therefore illegal, and that in any event no mandamus ought to be granted. Neville J. granted the plaintiffs judgment for their debt, but in the exercise of his discretion declined to grant a mandamus, and from that refusal this appeal has been brought. It does not appear that in the argument before the learned judge any distinction was drawn between two parts of the claim, namely, the part for the period ending September, 1904, and the part for the year ending September, 1905. I should add that the subsequent payments have been made in due course. In my opinion there is a wide distinction between the two. By common mistake the plaintiffs did not demand and the defendants did not pay the full amount due for the earlier years. I can see nothing to justify the Court in granting a mandamus the effect of which would be to throw upon the ratepayers of 1908 arrears which were not even demanded until April, 1905. With respect, however, to the year 1904-5 different considerations arise. The demand was made in the course of the current year, and it might have been complied with in the course of that year. Negotiations were entered into and continued until the writ was issued. In these circumstances I think it would be wrong for us to say that the delay was so long and so unjustifiable that we ought not to assist the plaintiffs by granting a mandamus. It follows, therefore, that in my view the appeal ought to be allowed and a mandamus granted, but only to the extent of the amount due for the year 1904-5 with interest. The plaintiffs are entitled to the full costs of the action in the Court below. But, having regard to the fact that the distinction upon which our decision is based was not presented to Neville J., there should be no costs of the appeal.

BUCKLEY L.J. To say that a rate cannot lawfully be made retrospectively is to state the general principle that the ratepayers of each year ought to bear the expenses of the year; that the ratepayers of a subsequent year (who may be different persons) ought not to be made liable in respect of that which should have been borne by their predecessors in liability. This is a first general principle which seems to run through all the cases. But, secondly, there is no rule of law

which prohibits a retrospective rate : *Harrison* v. *Stickney*. (1) I have listened with interest to the very numerous cases which have been cited to see whether I could extract from them any general principle upon which a retrospective rate may under the authority of *Harrison* v. *Stickney* (1) be made, notwithstanding that it is in contravention of the general principle first stated, namely, that the ratepayers of a subsequent year ought not to be called upon to bear the liability of an earlier year. I confess myself defeated in finding any general principle. If a creditor to whom money is due in respect of a debt incurred during some one rating year commences his action within the year and gets judgment after the expiration of the year, a rate may be made to satisfy the judgment. This would seem to recognize as sound the principle that a demand made during the year is not to be defeated by the expiration of the year before the demand is satisfied. But the cases do not stop there. If the demand be not made during the year, but be subsequently made, yet if the fact is that the amount of the debt was not ascertained until the expiration of the year, a rate for its payment is not illegal : *Reg.* v. *Leigh Rural Council*. (2) The case there was one of claim and cross-claim, and until the balance due was ascertained the amount of the debt was not known. But of course the creditor might within the year have issued his writ and thus set in motion the machinery for evoking the cross-claim and ascertaining the balance. But the decision shews that he is not to be defeated by reason of the fact that he did not do so. The test, therefore, cannot be whether the creditor on the one hand sought within the year, or on the other might have sought but did not seek within the year, satisfaction of his debt. I do not find that any of the judgments in *Reg.* v. *Leigh Rural Council* (2) refer to any such ground. The debt there was in 1895; the action was commenced in March, 1897, and the decision is rested upon the fact that the mandamus was applied for in the same rating year in which the amount of the debt was first ascertained. The Court, I think, there affirmed that there was a discretion, and that if the creditor had not been guilty of delay, or if his delay in commencing his action was

(1) 2 H. L. C. 108. (2) [1898] 1 Q. B. 836.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL. — Buckley L.J.

satisfactorily explained, the Court would exercise its discretion by granting the mandamus, although the result would be to throw upon the ratepayers of a subsequent year the liability incurred in a former year. I have difficulty, I confess, in seeing how there can be a discretion to make one person liable for the debt of another. But the decision (which is a decision of this Court) seems to me to affirm that there is a discretion.

The relevant facts here are that a certain arrear of 1925*l.* to September 29, 1904 (part of the amount for which judgment has been obtained), incurred and left unprovided for in the current year for rating purposes, was so left because neither creditor nor debtor believed it to be due. I can see no ground upon which the ratepayers of a subsequent year should be made liable for a debt of which the creditor did not ask payment in the current year for rating purposes, for the simple reason that he did not think it was owing to him. On April 18, 1905, however, the creditor ascertained and asserted that he was entitled to be paid on what was in fact the right footing. The unpaid sum for the year then current is 2394*l.* Here the creditor was in the year asserting that he was entitled to payment. He did not, it is true, issue any writ, but negotiations went on, and the defendants could have provided, but did not provide, in the current year for that which the creditor was asserting to be, and which was in fact, a liability of the year. In determining how, under these circumstances, the discretion, which I understand *Reg.* v. *Leigh Rural Council* (1) determines to reside in the Court, ought to be exercised, I do not see that any conclusion adverse to the creditor ought to be arrived at because during the current rating year he failed to commence an action to enforce the claim which he in fact preferred. Upon the principle of the authorities, so far as I am able to find it, I think that the mandamus ought to go not as to the 1925*l.* due to September 29, 1904, but as to the 2394*l.* due from September, 1904, to September, 1905, and the interest on the last-mentioned sum. As to the 273*l.* for costs, there is no question about mandamus. For these the defendants are liable, and they propose to pay them. As regards the costs, I agree with what the Master of the Rolls has said.

(1) [1898] 1 Q. B. 836.

KENNEDY L.J. It is quite unnecessary for me to state the facts which give rise to the present action. They sufficiently appear in the judgment of Neville J. in the Court below and in the judgments of the Master of the Rolls and Buckley L.J. in this Court. None of them are in controversy now. The amount claimed by the plaintiffs has never been in dispute as a matter of computation; and whilst, until this case came into Court, the defendants apparently withheld, and indeed in their pleadings had refused, any formal admission of legal liability, the history of the negotiations between the parties and the payment to the plaintiffs of 1000*l.* in March, 1906, shew plainly enough that there never was any real difference as to the fact or the measure of the defendants' indebtedness. The only question before us is as to the plaintiffs' remedy. The plaintiffs claim the grant of a mandamus directing the defendants to issue precepts according to the provisions of the Public Health Act, 1875, to the overseers of these contributory parishes within the defendants' area for the levy of a rate sufficient to cover the amount of the judgment to which the defendants consented at the trial of the action. The defendants' objection is that such a rate would be what is termed a retrospective rate, i.e., a rate now to be levied for an indebtedness which ought to have been defrayed by the ratepayers of the respective parishes in one or more previous years. They have successfully contended in the Court below that a mandamus ought not to be granted for such a purpose. Unquestionably the matter is one of difficulty.

There is the highest authority that there is no rule of law which prohibits a retrospective rate. In the year 1848 Parke B., delivering the opinion of the judges which was adopted by the House of Lords in the case of *Harrison* v. *Stickney* (1), so stated, adding, "That depends upon the intention of the Legislature, and the question is, whether the Act under which each rate is made, does so expressly or impliedly." It is equally clear upon the authorities that the Court ought, where a discretionary power is invoked, to be slow to exercise its discretion in favour of a retrospective rate. As early as 1837, in *Woods* v. *Reed* (2),

(1) 2 H. L. C. 108, 125. (2) 2 M. & W. 784.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL. — Kennedy L.J.

Lord Abinger C.B. said: "The general inconvenience of retrospective rates has been long known and recognized in the Courts of law, on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors have had the whole benefit." Patteson J., in 1849, *Reg.* v. *Read* (1); Watson B., in 1858, *Waddington* v. *London Union* (2); Denman J., in 1886, *Saul* v. *Wigton Rural Sanitary Authority* (3); and quite recently Channell J., in *Smith* v. *Southampton Corporation* (4), have expressed themselves to the like effect. I shall quote only from the last-named judgment. Speaking of the objection to retrospective rates, my brother Channell observed: "It means that any ratepayer is entitled to say that he is being charged with a sum which ought to have been charged upon and paid by the ratepayers in previous years. The principle is that these bodies are only entitled to charge upon future ratepayers present expenditure so far as they have statutory borrowing powers; the effect of their borrowing powers is to enable them to charge instalments of present expenditure upon future ratepayers, and borrowing powers are granted upon the understanding that the capital expenditure benefits the future ratepayers." I will add to the argument of justice that, as has been elsewhere judicially noticed, there is a sound reason of public policy in discouraging retrospective rates. The knowledge that the burden of payment might be cast, not upon those who incur an expense, but upon a future set of ratepayers, would certainly tend both to make local authorities less careful in considering the necessity of a proposed expense and in framing their estimate of the cost of schemes of improvements, and also to make the ratepayers themselves less careful in their scrutiny of the local administration.

In dealing with the case of "a poor rate pure and simple," to borrow the phrase of A. L. Smith L.J. in *Reg.* v. *Leigh Rural Council* (5), the Courts have been strict, as the Lord Justice points out in an earlier passage of his judgment on

(1) 13 Q. B. 524, 535.
(2) E. B. & E. 370.
(3) 56 L. T. 438.
(4) [1902] 2 K. B. 244, 253.
(5) [1898] 1 Q. B. 836, 843.

the same page of the report, in holding that a poor rate can only be levied in respect of charges incurred within the rating year. The language of Watson B. in delivering the judgment of the Exchequer Chamber in *Waddington* v. *London Union* (1) is very definite upon this point: "Upon the construction of this statute"—that is 43 Eliz. c. 2—"it has been uniformly held that the power of taxation under it can be exercised to meet prospective expenses only, and that it is not lawful to make a poor rate for the payment of a past debt." And so in 1890, in the case of *Earl Jersey* v. *Uxbridge Rural Sanitary Authority*, which is not reported, but which is referred to in the case before Stirling J. in 1891, *Earl Jersey* v. *Uxbridge Rural Sanitary Authority* (2), the report of which supplied to this Court was from the shorthand notes, Vaughan Williams J. observed: "Now the case of *Waddington* v. *London Union* (1) seems a clear decision that it is not lawful to make a poor rate for the payment of a past debt. . . . . This decision does not seem to be to the effect that all retrospective rates are bad, but only that retrospective poor rates are bad." To the like effect are the judgments of Day J. and A. L. Smith J. in *Reg.* v. *Bedlington Overseers.* (3) It appears to me that my brother Neville was well warranted in saying that prior to *Reg.* v. *Leigh Rural Council* (4) there is abundant authority to shew that with regard to a poor rate it was illegal to levy a rate for the payment of debts which had been incurred prior to the rating year, subject, I think, only to two qualifications or exceptions, one of which he expressly notices, namely, first, where the amount of the debt could not be ascertained until some time after it had been incurred—and see as to this the remarks in the judgment I have referred to before of A. L. Smith J. in *Reg.* v. *Bedlington Overseers* (3)—and, secondly, where the circumstances of the case bring it within the provisions of 22 & 23 Vict. c. 49, s. 6.

In regard to local sanitary authorities levying rates for purposes other than the relief of the poor a time limit of six months for retrospective rates was imposed upon local boards of health by the Public Health Act of 1848 (11 & 12 Vict. c. 63), s. 89.

(1) E. B. & E. 370, 397.
(2) [1891] 3 Ch. 183.
(3) 48 J. P. 486, 487.
(4) [1898] 1 Q. B. 836.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL. — Kennedy L.J.

The words are "retrospectively in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months before the making of the rate"; and, so far as regards expenses chargeable to the district fund, an identical provision exists at present in the case of urban sanitary authorities under s. 210 of the Public Health Act, 1875.

It is, I think, futile to try to draw any inference of general principle from the reported decisions as to the grant of mandamus in cases to which these sections of the Acts of 1848 and 1875 apply. All that can safely be deduced from the cases is that, on the one hand, if no proceedings of any kind to enforce the claim for debt have been taken within six months after the debt has become ascertained and due, there must, even if a judgment be obtained, be some very special circumstances to justify the Court in granting a mandamus: see the decision in *Burland* v. *Kingston-upon-Hull Local Board* (1); and, on the other hand, even although no action has been taken for six months after the accrual of the right of action, yet, if within six months after the judgment—see *Worthington* v. *Hulton* (2)—or even if the interval between judgment and the application for the mandamus exceeded six months, owing to an agreement between the parties—*Reg.* v. *Rotherham Local Board* (3)—the Court might grant the mandamus to a plaintiff who was able to offer a reasonable explanation of his delay in taking and prosecuting legal proceedings. The decisions are not easily reconciled, and from the language of Mellor J., who delivered the judgment of the Court in *Worthington* v. *Hulton* (2), it is plain that he considered the opinion of Wightman J., as expressed in *Burland* v. *Kingston-upon-Hull Local Board* (1), as irreconcilable with the judgment he was then pronouncing. I may, I hope, say, with all respect due to the Courts which decided *Reg.* v. *Rotherham Local Board* (3) and *Worthington* v. *Hulton* (2), that unless, as was expressly held in the former case, a judgment in an action of debt recovered against a local board constitutes a "charge" within the meaning of the Public Health

(1) 3 B. & S. 271.
(2) L. R. 1 Q. B. 63.
(3) 8 E. & B. 906.

Act, 1848, s. 89, and s. 210 of the Public Health Act, 1875, I do not find it quite easy to harmonize those decisions, according to any definite principle, with the statutory provisions.

I have felt it my duty to deal with these cases under the provisions of the Public Health Act, 1848, s. 89, and the Public Health Act, 1875, s. 210, because they were so much discussed on the hearing of this appeal, and especially in the argument which was so ably addressed to us by the learned counsel for the appellants. But I do not think that the consideration of them really gives us much help in deciding the present case. The question before us has arisen not under s. 210, but under the distinct and very different provisions of ss. 229 and 230, which relate to a rural sanitary authority in the matter of contributions for special expenses and contain no provision for retrospective rating if the charge or expense has been incurred within six months. In regard to the legality or illegality of a retrospective rate we must, according to the law laid down in *Harrison* v. *Stickney* (1), look to the particular statutory provisions which relate to the imposition of the rate in question. For the purpose of the present inquiry the important part of s. 230 is as follows: "A separate rate under this section shall, as respects the powers of the overseers in relation to making assessing and levying such rate, and as respects the appeal against such rate, and all other incidents thereof except the purposes to which it is applicable, and such exemption as aforesaid, and except the allowance of justices, which shall not be required, be subject to the same provisions as apply in law to a rate levied for the relief of the poor." It is, I think, not really open to me since the judgment of the Court of Appeal in *Reg.* v. *Leigh Rural Council* (2) to consider whether this language should not be interpreted as putting the levy of a rate for special expenses on the same footing as the levy of a poor rate "pure and simple," which is illegal if made retrospectively. It is true that both the parties to that judgment, A. L. Smith L.J. and Collins L.J., held that their decision in favour of granting a mandamus might be rested, in the peculiar facts of that case, on the ground that practically and as a matter of business the rights of the parties only ripened

(1) 2 H. L. C. 108. (2) [1898] 1 Q. B. 836.

C. A. 1908 — CROYDON CORPORATION v. CROYDON RURAL COUNCIL. — Kennedy L.J.

into an ascertained liability when they were fixed by the judgment. But I feel bound to say that in my opinion the judgments of both the Lords Justices do assert that there is not in this 230th section any prohibition of a retrospective rate, and that the grant of a mandamus to enforce the levying of such a rate is a matter of discretion to be exercised according to the merits of the particular case. Collins L.J. says this, I think, quite clearly (1): "I do not think that there is any prohibition either express or implied under the statute now in question against a rate to provide for a liability which has only ripened into a judgment after the end of the year in which the liability accrued. In such a case the Court would have a discretion as to enforcing the making of a rate by mandamus, and, if there were no sufficient excuse for the delay, they might refuse to do so." A. L. Smith L.J. is not so explicit on the point, but it seems to me that the portion of his judgment which follows his statement on p. 843, that no doubt there is considerable authority for the defendants' contention that a poor rate can only be levied in respect of charges incurred within the rating year, shews with sufficient clearness that in his view, as in that of Collins L.J., the passage from s. 230 which I have quoted, in spite of its reference to provisions of law affecting poor rate levy, does not import into the case of the separate rate under that section the prohibition on retrospective levy which has been held to exist (subject to the qualifications which I have mentioned in an earlier part of this judgment) in the case of the poor rate proper. It appears to me that the judgments in *Reg.* v. *Leigh Rural Council* (2) must be read as authorizing the enforcement by mandamus of a retrospective levy in the case of "special expenses" under s. 230.

The remaining question is as to the propriety of the exercise of that discretion in the plaintiffs' favour in the present case. Neville J. has refused the mandamus, and, upon the case as it was presented to him, I am of opinion that his judgment was right. There was no suggestion on the pleadings in the case, or, as counsel before us agreed, in the argument before him, that a discrimination might be made between the indebtedness

(1) [1898] 1 Q. B. 846. (2) [1898] 1 Q. B. 836.

arising in reference to the year September, 1904,—September, 1905, and the indebtedness which had accumulated in respect of the preceding years since 1900. The plaintiffs claimed the mandamus in reference to the whole indebtedness as a single undivided amount. In the course of the argument, however, in this Court it was contended that the debt due before September, 1904, and the debt which has accrued since that date may be distinguished, and we have to decide whether, although the discretion of Neville J. has been rightly exercised so far as the plaintiffs seek the remedy of mandamus in respect of the debt due to them which had accumulated before September, 1904, the subsequently accruing debt from September, 1904, to September, 1905, may not be treated as a debt the payment of which may properly be enforced by means of a mandamus granted to the creditor of the rural sanitary authority. The Master of the Rolls and Buckley L.J. are of opinion that the Court ought to exercise a discretion in favour of the plaintiffs in regard to this latest portion of the debt. I think it is plain that the fact that in April, 1905, the plaintiffs called the attention of the defendants to the true state of their liability under the agreement of 1900; the fact that negotiations with a view to a discharge of that liability thereupon commenced and continued until the commencement of this action; and the fact that, so far as I can see, there is no statutory provision which would have prohibited the defendants from issuing after April, 1905, a precept for the amount truly due for that year, are all matters which ought to have weight in considering the plaintiffs' right to a favourable exercise of the Court's discretion in regard to so much of their claim as arises in respect of 1905. Assuming, as we are bound to assume, that *Reg.* v. *Leigh Rural Council* (1) was rightly decided, it appears to me that the circumstances of the case warrant this Court in coming to the conclusion in favour of the appellants of which the Master of the Rolls and Buckley L.J. have expressed their approval. And, for myself, although I have felt considerable hesitation, in view of the hardship which the incidence of the levy, as pointed out by Neville J., will inflict, I cannot see any sufficient justification on that ground for differing, upon a

(1) [1898] 1 Q. B. 836.

C. A. 1908

CROYDON CORPORATION v. CROYDON RURAL COUNCIL.

question of discretion, from the view which has commended itself to the rest of the Court.

Solicitors: *Smith, Rundell & Dods, for F. C. Lloyd, Croydon; C. E. S. Whitford.*

H. C. R.

JOYCE J. 1908 *May* 15, 22.

In re BOWERMAN. PORTER *v.* BOWERMAN.

[1907 B. 4907.]

Administration—Real Estate—Exoneration—Estate Duty—"Equitable Charge"—Real Estate Charges Acts, (Locke King's Act) 1854 (17 & 18 *Vict. c.* 113), *and* 1877 (40 & 41 *Vict. c.* 34)—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 8, *sub-s.* 13; *s.* 9, *sub-s.* 1.

The charge, created by s. 2, sub-s. 1, of the Finance Act, 1894, whereby estate duty is charged upon property, is an "equitable charge" within the Real Estate Charges Act, 1877. Where, therefore, land descended on an intestacy in 1904 to B., who himself died intestate in 1907 without having paid the estate duty which became payable on the death of his predecessor:—

Held, that the Real Estate Charges Act, 1877, applied, and that B.'s heir-at-law was not entitled to have the land exonerated from payment of the duty by the personal estate.

ADJOURNED SUMMONS.

Agnes Ellen Bowerman, spinster, died on October 30, 1904, intestate, and leaving her father, George Bowerman, her heir-at-law and sole next of kin.

At the date of her death she was seised (inter alia) of a freehold messuage at St. Leonards-on-Sea.

George Bowerman did not take out administration to her estate, nor did he account for or pay the estate duty which on her death became payable in respect of her estate.

George Bowerman died intestate on July 7, 1907, leaving the defendant E. E. Bowerman, the only child of his deceased brother, his heiress-at-law, and the said E. E. Bowerman, the defendant Sarah Bowerman, and the plaintiff (his two sisters), his sole next of kin.

The estate of George Bowerman comprised the said freehold

messuage at St. Leonards, and certain other real and personal property.

This summons was taken out by the plaintiff, who was the administratrix of the respective estates of Agnes Bowerman and George Bowerman, for the determination of the question whether the estate duty, which became payable on the death of Agnes Bowerman in respect of her said real estate, ought to be discharged out of the same in exoneration of the personal estate of George Bowerman, or out of the said personal estate in exoneration of the said real estate.

Austen-Cartmell, for the plaintiff. This duty is made a first charge by s. 9, sub-s. 1, of the Finance Act, 1894. George Bowerman became entitled to the property charged with the duty. The charge of the duty constitutes an "equitable charge" within the meaning of the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), s. 1: *In re Anthony* (1); *Nesbitt* v. *Lawder*. (2)

Whinney, for Sarah Bowerman. This case is free from the difficulty which the Court had in *In re Anthony* (1), namely, that the equitable charge created by 1 & 2 Vict. c. 110 was said to have merged in the legal estate created by the writ of elegit without which, by 27 & 28 Vict. c. 112, the charge could not be enforced. That this is an "equitable charge" is shewn by the proviso to s. 9, sub-s. 1, of the Finance Act, 1894. The mere fact that it is created by statute does not make it any the less an "equitable charge." [He also referred to *In re Sharland*. (3)]

J. G. Wood, for E. E. Bowerman. On the death of Agnes Bowerman the duty no doubt became a charge on the property and remained a charge upon it on George Bowerman's death. But it was also a debt due to the Crown from George Bowerman: Finance Act, 1894, s. 8. It is not a mortgage within Locke King's Act, 1854 (17 & 18 Vict. c. 113), nor an "equitable charge" within 40 & 41 Vict. c. 34. It is in effect a statutory charge. The Finance Act, 1894, itself supplies the remedy: s. 8, sub-s. 13. It does not provide that the charge is to be enforced

(1) [1892] 1 Ch. 450. (2) (1886) 17 L. R. Ir. 53.
(3) (1896) 74 L. T. 664.

JOYCE J. 1908 BOWERMAN, *In re.* PORTER *v.* BOWERMAN.

in a Court of Equity. The old rule, therefore, as to the exoneration of the realty applies, and E. E. Bowerman is entitled to have the duty on the property payable on the death of Agnes Bowerman discharged out of G. Bowerman's personal estate. *In re Anthony* (1) turned on 1 & 2 Vict. c. 110 and does not conclude this case.

May 22. JOYCE J. Since the adjournment of the hearing of this case I have had an opportunity of considering it, so that I need not trouble you, Mr. Cartmell, to reply. It would almost seem that a kind of fatality has attended the efforts of the Legislature to put an end to the exoneration out of personal estate of charges upon the real estate of a deceased owner. I have now to interpret the meaning or application of the last of these Acts, namely, the Real Estate Charges Act, 1877, with respect to the meaning of "charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money."

The question seems to me to be whether the term "any other equitable charge" in the phrase "mortgage or any other equitable charge" in this Act is used to designate and means a merely equitable charge—something which is only that and nothing else—or is applicable to and comprehends every equitable charge even though such charge be also legal, in whatever sense that word can be used in reference thereto.

The charge the subject of the present application is created by s. 9, sub-s. 1, of the Finance Act, 1894, and s. 8, sub-s. 13, provides, "Where any proceeding for the recovery of estate duty in respect of any property is instituted, the High Court shall have jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property." It is contended that such a charge is not included in the provisions of this Real Estate Charges Act, 1877, because the charge, whether equitable in the proper sense of that term or not, is a legal charge, as indeed it is, in the sense that it is created by statute with such provisions as those in s. 8, sub-s. 13, of the Finance Act, 1894, and is valid and effectual at law as well as in

(1) [1892] 1 Ch. 450.

equity. I do not think it could seriously be denied that even without the express provisions of s. 8, sub-s. 13, this charge could and would, before the Judicature Acts, have been enforced in the Court of Chancery, and is, in the proper sense of the term, an equitable charge, as I hold it to be. Further, as it appears to me, this charge is not a legal charge in the sense in which the word "legal" is ordinarily used in the phrase "legal mortgage or charge." No legal estate or property is vested in the creditor, nor is there any covenant to pay. Of course, however, since the Judicature Act which came into operation on November 1, 1875, before the Real Estate Charges Act, 1877, whatever would previously have constituted a merely equitable charge is now recognized and enforceable in the King's Bench as well as in the Chancery Division of the High Court.

It would require a good deal of argument to convince me that the application of this statute, the Real Estate Charges Act, 1877, is confined to mortgages and such other charges as are merely equitable and not created by statute. In so enacting there would, to my mind, have been no sense or reason, having regard to the course of previous legislation. Besides, the word "any" is used—"any other equitable charge"—that is, the Act applies to every equitable charge, not merely to equitable charges of a particular kind or species. As I have already said, every valid equitable charge is now also legal in the sense that it is recognized and enforceable at law as well as in equity; and a legal mortgage is, as always, enforceable in equity, and in that sense an equitable charge, and is so treated in the language of the Real Estate Charges Act, 1877, when it speaks of "mortgage or any other equitable charge." The only way, as it appears to me, in which the charge now under consideration differs from any other equitable charge is that it is created by statute, not by contract between parties. It is none the less an "equitable charge," and I fail to see how its origin or the mode in which it was created can be material to the construction or applicability of the provisions of the Real Estate Charges Act, 1877. It is not a legal mortgage, or a mortgage at all in the ordinary sense of that term, but it certainly is an equitable charge whatever else it may be. I do not hesitate to

JOYCE J. 1908 BOWERMAN, *In re.* PORTER *v.* BOWERMAN.

decide that no equitable charge is excluded from the operation of the Act merely because it was created by statute or would independently of the Judicature Acts be enforceable in a Court of law. In my opinion the Real Estate Charges Act, 1877, is applicable to and includes every equitable charge of whatever nature or description, whether created by statute or however enforceable or whatever else it may be, provided only that it be an equitable charge, which I repeat is, in my opinion, the case with respect to the charge created by s. 9, sub-s. 1, of the Finance Act, 1894.

Solicitors: *Slack, Monro & Atkinson; Langham, Son & Douglas.*

G. A. S.

SWINFEN EADY J. 1908 *March* 25; *April* 3, 4; *May* 16.

In re STIRLING.
STIRLING *v.* STIRLING.

[1905 S. 2853.]

Marriage—Divorce—Foreign Jurisdiction—Putative Marriage—Legitimacy of Issue—Law of Scotland—Good Faith of Spouses—Error in Fact—Error in Law.

S., whose domicil of origin was Scottish, went in or about 1880 to Canada, where he married a wife in 1883. He lived with her there until the beginning of 1895. She then left him and joined W., with whom she had previously committed adultery. S. then went into North Dakota and, after a nominal residence of ninety days, procured a divorce, which was admittedly invalid according to the laws of Scotland or Canada, because S. was not truly domiciled in North Dakota. Adultery was not alleged in the divorce proceedings, and the divorce was granted on grounds which would not be held sufficient in Scotland or in Canada. Soon after the divorce W. and the divorced wife of S. went through the form of marriage in San Francisco. The defendant was the only child of this marriage. If legitimate, he was entitled, as heir in tail male of the father of W., to certain lands in Scotland and to certain stocks in English railways held upon trust for the persons entitled to the lands. The plaintiff, the next tenant in tail in remainder, brought this action for a declaration that the defendant was illegitimate, and that the plaintiff was entitled to the income of the investments other than the lands. The defence was that the defendant was legitimate by virtue of the doctrine of the canon law as to putative marriage, namely, that the children of an invalid marriage will be legitimate if the spouses, or one of them, have entered into the marriage

bona fide and in ignorance of the impediment. There was conflicting evidence on the question whether this doctrine of putative marriage was part of the law of Scotland or not, but it was admitted that, if it was, the ignorance of the spouse must be founded on an error of fact and not an error of law. The ignorance alleged in this case was that the spouses did not know that the North Dakota divorce would not be recognized in Scotland.

The judge refused to decide the first point, but held that the ignorance alleged was an error of law and not an error of fact, whether the domicil of W. at the date of the marriage was Scottish or Canadian. The defendant was therefore illegitimate, even if the doctrine of putative marriage was part of the law of Scotland. The declaration asked for was made.

Semble, a divorce granted by a foreign Court having full jurisdiction on grounds not recognized as sufficient by the law of Scotland will not be recognized by the Scottish Courts.

AGNES STIRLING by her will dated November 18, 1872, gave all her residuary estate to trustees upon trust for sale and conversion and to lay out the proceeds from time to time in the purchase of lands in Stirlingshire and Lanarkshire, in Scotland, or either of those counties, and until purchases could be effected she directed that the money should be invested by them in their names upon such investments as they in their discretion should consider good and available, and that the income from such investments should be paid to the same person as would be entitled to the rent of the land so to be purchased; and she directed that the land so to be purchased should be settled by her trustees by a valid deed of strict entail according to the law of Scotland upon and in favour of Thomas Mayne Stirling, her nephew, and the heirs male of his body, with remainders over in strict settlement.

The testatrix died on February 22, 1873.

Thomas Mayne Stirling survived her and died on September 5, 1893, having had issue eight sons, of whom the first, second, third, and fifth had died without issue before the date of these proceedings. The fourth, Walter Stirling, had died leaving an infant son, Richard Stirling, whose legitimacy was now in question. The sixth was the plaintiff. At the date of this action the residuary estate of the testatrix consisted of lands in Scotland, purchased for 22,180*l.*, and investments in English and Indian railway stock of the nominal amount of 33,000*l.* and upwards. In

SWINFEN EADY J.

1908

STIRLING, *In re.*

STIRLING *v.* STIRLING.

August, 1905, the plaintiff brought this action in England for a declaration that, in the events which had happened, he was entitled to the income of the investments, other than the said lands, representing the residuary estate of the testatrix, and for the execution of the trusts of her will. The defendants were the infant Richard Stirling and the trustees.

The facts as found by the Court, upon which the question of the legitimacy of the infant Richard Stirling depended, were as follows.

In 1884 Walter Stirling went to British Columbia and there made the acquaintance of G. A. Smith, with whom he took up land at Sproat Lake, Alberni, B.C. Smith was the son of a Scottish minister in the Orkney Islands and was born in 1858, and when about twenty or twenty-two went out to Canada, where on August 6, 1883, he married E. G. Seager, a spinster. A house was erected at Sproat Lake, and Mrs. Smith, who had been staying at Seattle, rejoined her husband about 1885. From that time until December 31, 1894, Walter Stirling resided in the same house with Mr. and Mrs. Smith. It was admitted that Walter Stirling and Mrs. Smith had committed adultery. Walter Stirling left Sproat Lake on December 31, 1894, and three days afterwards Mrs. Smith left her husband and joined Stirling, and they went together to Seattle. G. A. Smith went to Victoria to consult a lawyer about obtaining a divorce. The lawyer advised him that it was doubtful whether a divorce could be obtained in British Columbia, and introduced him to a lawyer at Seattle, in the State of Washington. This lawyer advised him that the easiest way of obtaining a divorce was to go to Fargo, in North Dakota, where a residence of ninety days would probably constitute a sufficient domicil to obtain a divorce. About the same time Mrs. Smith consulted a lawyer in Seattle, who prepared a power of attorney to a lawyer at Fargo, named Guptill, authorizing him to act for her in any suit or action to be brought against her in North Dakota. This document was acknowledged by Mrs. Smith on February 21, 1895, and Guptill was instructed to act for her in an action for divorce, when brought against her by her husband, and not to oppose a divorce if Smith should not by his complaint seek his divorce on grounds

of a scandalous nature. On May 15, 1895, Smith filed his complaint in divorce proceedings in the District Court at Fargo. The complaint did not allege adultery. The grounds alleged were that Mrs. Smith, in her husband's absence, associated and became so intimate with Stirling as to cause gossip, that she thought more of him than of her husband, that she neglected the children, was now travelling with Stirling in California and Washington, and refused to live with Smith. The divorce proceedings were very rapid. Guptill accepted service for Mrs. Smith and agreed to the case being immediately disposed of by the judge, with the result that an order for divorce was made on the same day, and on May 27, 1895, a formal judgment was entered up pursuant to the order, decreeing that G. A. Smith be divorced from E. G. Smith, and that the bonds of matrimony between them were thereby dissolved. G. A. Smith soon afterwards returned to Alberni.

On December 4, 1895, Walter Stirling went through the form of marriage with Mrs. Smith, and the infant defendant was born of that union about twelve months afterwards.

Hon. E. C. Macnaghten, K.C., and *Vernon Harcourt*, for the plaintiff. The question is whether the infant child of Walter and E. G. Stirling is legitimate. That depends upon whether his mother's first marriage to Smith was legally dissolved by the North Dakota divorce. It is quite clear that Smith never acquired any, even a so-called matrimonial, domicil in North Dakota. We do not admit that the divorce was valid even according to the laws of North Dakota. But if it were, it would not be recognized in the country of Smith's domicil. His domicil of origin was Scottish. There is no evidence whether he had acquired a Canadian domicil, but it makes no difference, for the divorce would not be recognized either in Scotland or Canada: *Pitt* v. *Pitt*. (1)

[*Micklem, K.C.*, and *Method*, for the infant defendant, stated that they admitted the divorce would not be held valid in Scotland, but should contend that it was valid in North Dakota, and that the children of the marriage were legitimate in Scotland, by the

(1) (1864) 4 Macq. 627.

SWINFEN EADY J.
1908
STIRLING, *In re.*
STIRLING v. STIRLING.

doctrine of putative marriage, because the spouses believed that the divorce was valid, and therefore that their marriage was also valid.]

If that doctrine now forms part of the law of Scotland, which we deny, it does not arise in this case, for it depends on a bona fide ignorance of fact. The spouses here knew all the facts; if there was any mistake, it was one of law.

Evidence was then given on the foreign law.

McMaster, K.C. (of the Canadian Bar), called on behalf of the plaintiff, stated that the law of Canada as to the effect of a foreign divorce upon a domiciled Canadian was the same as that of England. A so-called matrimonial domicil was not recognized. So long as the Canadian domicil remained a foreign divorce had no effect whatever. He referred to *Le Mesurier* v. *Le Mesurier* (1); *Magurn* v. *Magurn*. (2) It was doubtful whether a divorce could be obtained in Canada at all without an Act of Parliament. The point was raised in a case of *Watt* v. *Watt* (3) now under appeal to the Privy Council. This evidence was not disputed.

As to the law of Scotland, the Lord Advocate (Shaw, K.C.) and Morison, K.C., of the Scottish Bar, were called on behalf of the plaintiff; and the Solicitor-General for Scotland (Ure, K.C.) was called on behalf of the defendant.

All three witnesses agreed that the law of Scotland, like that of England, recognizes a divorce pronounced by a foreign Court if, and only if, the husband was actually domiciled in the foreign country. A so-called matrimonial domicil would not be recognized. But if a true domicil had been acquired, it would make no difference that one of the motives of the husband in acquiring it was to obtain a divorce. On these points they cited *Pitt* v. *Pitt* (4); *Shaw* v. *Gould* (5); *Carswell* v. *Carswell*. (6) But the Scottish Courts would, even in a case in which there was a true foreign domicil, examine into the grounds on which the divorce was granted, and if they were grounds not recognized in

(1) [1895] A. C. 517.
(2) (1885) 11 Ont. App. Rep. 178.
(3) The case is not reported. The witness referred to a shorthand note.
(4) 4 Macq. 627.
(5) (1868) L. R. 3 H. L. 55.
(6) (1881) 8 R. 901.

Scotland the Courts would hold them to be contra bonos mores and refuse to recognize the divorce. The case of *Bater* v. *Bater* (1), which decided that the English Courts will recognize a divorce by a foreign Court having jurisdiction, even if granted for a cause which would not have been sufficient in England, and the cases of *Harvey* v. *Farnie* (2) and *Le Mesurier* v. *Le Mesurier* (3), so far as they establish the same proposition, apply to Scotland only with the exception of grounds which in the view of Scottish Courts are contra bonos mores.

Desertion is recognized as a ground for divorce in Scotland, but only if for a long period and where the deserted party is willing to "adhere": *Mackenzie* v. *Mackenzie* (4); *Watson* v. *Watson* (5); *Carswell* v. *Carswell* (6); Fraser on Husband and Wife, 2nd ed. p. 1331. The grounds stated in the order for divorce in this case would not be recognized as sufficient in the Scottish Courts.

On the question of legitimation of the issue of a putative marriage there was a difference of opinion. All three witnesses admitted that by the canon law the issue of a putative marriage (i.e., a marriage invalid in fact but regularly celebrated between parties one or both of whom were bona fide ignorant of the impediment which made the marriage invalid), born before the marriage was declared void, would be legitimate. The Lord Advocate and Morison, K.C., were of opinion that the doctrine had never been part of the law of Scotland, or at least would not now be adopted, and that Lord Fraser, upon whose authority the validity of the doctrine chiefly depended (see Fraser on Parent and Child, 3rd ed. pp. 27 to 35; Fraser on Husband and Wife, 2nd ed. pp. 137, 151), was led away by an inclination to assume that the canon law was imported into the law of Scotland more entirely than was the fact. They considered that *Petrie* v. *Ross* (7) was not rightly decided.

The Solicitor-General for Scotland was of opinion that the doctrine of the putative marriage was part of the law of Scotland and would still, in a proper case, be applied by the Courts.

(1) [1906] P. 209.
(2) (1882) 8 App. Cas. 43.
(3) [1895] A. C. 517.
(4) [1895] A. C. 384.
(5) (1890) 17 R. 736.
(6) 8 R. 901.
(7) (1896) 3 Sc. L. T. 250; 4 Sc. L. T. 94.

SWINFEN EADY J.

1908

STIRLING, *In re.* STIRLING *v.* STIRLING.

He agreed with the statement of the law in Fraser on Parent and Child, and thought *Petrie* v. *Ross* (1) was rightly decided.

All three witnesses agreed that the ignorance of the parties to a putative marriage of the impediment to their marriage, necessary to make the offspring legitimate, must be an error of fact, not an error of law. But the Lord Advocate and Morison, K.C., considered that ignorance of the invalidity of a divorce must in all cases be an error of law. The Solicitor-General thought that ignorance of the invalidity of a divorce according to the law of a country where the party was not domiciled might be deemed ignorance of fact. But he admitted that if in this case the Scottish Courts held the North Dakota divorce invalid on the ground that the husband was not domiciled there, he being domiciled in Scotland, the bona fide belief of the spouses, or one of them, that the foreign divorce was valid according to the law of their domicil would be an error of law.

The witnesses cited, in addition to Fraser, the following authorities :—Erskine's Institute of the Law of Scotland (Nicholson's ed. 1871), book 1, tit. 6, s. 51 ; Erskine's Principles of the Law of Scotland (Rankine's ed. 1903), p. 93; Bell's Principles of the Law of Scotland, 8th ed. book 3, cap. 2, s. 1625; Green's Encyclopædia of the Law of Scotland, art. "Parent and Child," vol. ix. p. 110; *Brymer* v. *Riddell* (2) ; *Jolly* v. *M'Gregor* (3) ; *Lapsley* v. *Grierson* (4) ; *Lockyer* v. *Ferriman* (5) ; *Purves' Trustees* v. *Purves.* (6)

Hon. E. C. Macnaghten, K.C., and *Vernon Harcourt,* for the plaintiff. The evidence is conclusive that the divorce was invalid by the law of Scotland, and the infant defendant could not be made legitimate under the doctrine of putative marriage, even if that doctrine is part of the law of Scotland.

Kenneth Wood, for the trustees of the will.

Micklem, K.C., and *Methold,* for the official solicitor representing the infant defendant. Mr. and Mrs. Smith were not

(1) 3 Sc. L. T. 250; 4 Sc. L. T. 94.

(2) Bell, "Case of Legitimacy under a Putative Marriage."

(3) (1828) 3 W. & S. App. 85.

(4) (1845) 8 D. 34 ; 1 H. L. C. 498.

(5) (1876) 3 R. 882.

(6) (1895) 22 R. 513.

domiciled in Scotland, but in Canada. The first question is whether the divorce obtained in North Dakota was valid. It clearly was not valid according to the law of Canada or of Scotland. Walter Stirling had apparently also acquired a domicil in Canada, but that is not important, because bona fide ignorance on the part of either spouse is sufficient to raise the doctrine of putative marriage. *Purves' Trustees* v. *Purves* (1) shews that the ignorance in this case was an error of fact. It was so recognized in *De Thoren* v. *Wall* (2), cited by Lord Fraser on Parent and Child, 3rd ed. p. 34. Indeed Mrs. Smith was under two errors of fact—(1.) that the divorce was ineffectual to bind her according to the law of her own domicil; (2.) that it would not be recognized as valid by the Court of Scotland. Ignorance of the law of Scotland was, according to law and authority, an error of fact.

[SWINFEN EADY J. Has the doctrine ever been applied to a foreigner?]

It must apply here, because the question depends on the descent of real estate. It must therefore be governed wholly by Scottish law, whatever the domicil may have been: Wheaton on International Law, 4th ed. p. 132, s. 81; Foote on Private International Jurisprudence, 3rd ed. pp. 201 et seq. English law only requires an heir to be legitimate by the law which governs the succession to real estate. The legitimacy of the children of a putative marriage is adopted by the French Code Civil, ss. 201, 202.

Hon. E. C. Macnaghten, K.C., in reply. There is no proof that Walter Stirling ever acquired a Canadian domicil. The burden of proof is always on the party alleging a change of domicil; the presumption is always in favour of the domicil of origin: *Munro* v. *Munro* (3); *Winans* v. *Attorney-General* (4); *Marchioness of Huntly* v. *Gaskell.* (5) His domicil was therefore Scottish. [He also referred to *The Lauderdale Peerage Case* (6) and *Shedden* v. *Patrick.* (7)]

(1) 22 R. 513.
(2) (1876) 3 R. (H. L.) 28.
(3) (1840) 7 Cl. & F. 842, 876.
(4) [1904] A. C. 287.
(5) [1906] A. C. 56.
(6) (1885) 10 App. Cas. 692.
(7) (1854) 1 Macq. 535.

SWINFEN EADY J.
1908
STIRLING, *In re.*
STIRLING *v.* STIRLING.

SWINFEN EADY J., after stating the facts as above, proceeded: —It is manifest upon a consideration of the foregoing facts that the North Dakota divorce was not of any validity to dissolve the marriage between Mr. and Mrs. Smith. By his temporary residence at Fargo G. A. Smith did not acquire any new domicil. He did not even acquire a so-called "matrimonial domicil," which is said to be created by a bona fide residence of the spouses within the territory of a less degree of permanence than is required to fix their true domicil. It does not appear that Mrs. Smith was ever within the State of North Dakota, and the short residence of G. A. Smith there was not a bona fide residence. In *Le Mesurier* v. *Le Mesurier* (1) Lord Watson said: "Bona fide residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicil." In the present case it is manifest that the short visit of G. A. Smith was for the sole purpose of obtaining a divorce, which there was difficulty, if not insuperable difficulty, in his obtaining in the country of the domicil. The North Dakota divorce was of no validity whatever, whether G. A. Smith's domicil were English or Scottish or Canadian. In *Le Mesurier's Case* (2) Lord Watson said: "When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognized rule of general law to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriage." With regard to Canada, the evidence of Mr. Donald McMaster, K.C., made the matter quite clear. If, and so long as, G. A. Smith had a Canadian domicil, no other forum could dissolve his marriage. Whether the only jurisdiction in Canada that could deal with the dissolution of the marriage was or was not the Canadian Parliament is a matter of doubt. No Court has been created by the Parliament of Canada for the purpose of dealing with divorces, and the question whether any Courts within the Dominion can decree the dissolution of marriages has been raised in British Columbia, in a case of *Watt* v. *Watt*,

(1) [1895] A. C. 517, 538. (2) [1895] A. C. 536.

now under appeal to the Privy Council. So far as there is any power in the Courts of British Columbia to grant divorces, it would be conferred by the proclamation of November 19, 1858, and the question is whether that proclamation extends to and includes the English Divorce Acts. Mr. Justice Clement held, after argument, in *Watt* v. *Watt* that the Court had no jurisdiction to deal with the subject-matter of divorce, and this is the question now under appeal. The state of the law in British Columbia on the subject of divorce probably affords some explanation of why G. A. Smith preferred to go to Fargo for a divorce. I am of opinion that the North Dakota divorce was not of any force or validity whatever to dissolve the marriage of Mr. and Mrs. Smith, and, therefore, that the subsequent union of Walter Stirling and Mrs. Smith was not a lawful marriage.

A further point was, however, taken on behalf of the infant defendant. It was contended that even if his parents were not lawfully married, yet they bona fide believed that they were lawfully married to one another; that in such case the law of Scotland, where the hereditaments in question are situate, recognizes the issue of such a union as legitimate if there has been ignorance by one of the parties of a material fact, the fact on which the validity of the marriage depends; that in the present case the material fact of which both Walter Stirling and Mrs. Smith were ignorant was that the Scottish law would refuse to recognize the North Dakota divorce as of any validity. The contention was that the domicil of the parties was Canadian, and the Scottish law was the law of a foreign country and must be treated as a question of fact for this purpose. This would be inconsistent with the opinion of Lord Colonsay in *Shaw* v. *Gould*. (1) Mr. Thomas Shaw, the Lord Advocate for Scotland, Mr. T. B. Morison, a Scottish King's Counsel, and Mr. Alexander Ure, the Solicitor-General for Scotland, were examined and gave evidence as to the law of Scotland, the first two on behalf of the plaintiff, and the last on behalf of the infant defendant. They differed in opinion as to how far at the present day the issue of a putative marriage would, under certain circumstances, be held to be legitimate in Scotland. If

(1) L. R. 3 H. L. 97.

SWINFEN EADY J.
1908
STIRLING, *In re.*
STIRLING v. STIRLING.

the decision of the present case depended upon any point of the law of Scotland which was left in doubt by the evidence of those distinguished lawyers, the proper course would be to send a case for the opinion on the subject to the Court of Session in Scotland under the provisions of the British Law Ascertainment Act, 1859 (22 & 23 Vict. c. 63), s. 1. But this action may be disposed of upon grounds which do not give rise to any difference of opinion among the Scottish lawyers, and upon a view of the law with which Mr. Ure expressed his concurrence. If Walter Stirling and Mrs. Smith were domiciled in Scotland, then an erroneous view of the way in which the law of their domicil would regard the North Dakota divorce would manifestly be an error in law and not an error of fact. Mr. Ure said that in his opinion, if the North Dakota divorce were held by the Scottish Courts to be invalid because the parties were not domiciled in North Dakota, the bona fide belief of one or other of the spouses that the foreign divorce was valid according to the law of their domicil would not render the issue legitimate. It would be error in law; the parties would have been badly advised as to the view which the general law of Scotland took of such a divorce. Mr. Ure agreed with the Lord Advocate on this point, and he also agreed with him that in Scotland a divorce would not be recognized unless it was granted by the country of the domicil of the husband. Mr. Ure's evidence also made it clear that the law of Scotland would not recognize as grounds of divorce the matters alleged in the North Dakota complaint, and that a divorce granted abroad in respect of those grounds would not be recognized in Scotland. If the domicil of Walter Stirling and Mrs. Smith or either of them was Canadian, the result would be the same. Mr. McMaster's evidence made it clear that the North Dakota divorce was of no validity in Canada. Now, if the parties or either of them were advised that by the law of their Canadian domicil the North Dakota divorce was valid and regular, and if they went through the ceremony of marriage in the erroneous belief that such advice was sound, that would be error of law and not of fact. Even if the question were "How would the law of Scotland regard that divorce under such circumstances?" and bad advice was given, Mr. Ure's opinion was that, according

to the law of Scotland, it would be considered an error in law; that if the foreign decree of divorce was held by the Scottish Courts to be invalid, because they do not recognize it as a valid divorce, then the error would be one of law, according to the law of Scotland. This is in accordance with the opinion expressed by Lord Colonsay in *Shaw* v. *Gould* (1), to which I have already referred. There was not in the present case any marriage under a bona fide mistake of fact which would give rise to the question whether the issue of a putative marriage would now be recognized as legitimate by the law of Scotland. The contention on behalf of the infant defendant really amounted to this: that a child of an invalid marriage of foreigners domiciled abroad, one of whom had, to the knowledge of the other, obtained a divorce from a previous spouse in some other country than that of the domicil, which divorce the general law of Scotland did not consider valid, and which child was illegitimate by the law of the domicil, would nevertheless be regarded in Scotland as legitimate for the purposes of inheriting Scottish land in due course of descent, if the parents were erroneously advised in their foreign domicil that such would be the result of the Scottish law and went through the ceremony of marriage on the faith of that advice; while if a child of domiciled Scottish people were born in Scotland under similar circumstances, similar erroneous advice having been given as to the effect in Scotland of the foreign divorce, the error in the general law of the Scottish domicil could not be considered an error of fact as in the case of foreign law, and that child would not therefore be considered legitimate in Scotland for the purpose of inheriting land there. Certainly none of the eminent Scottish lawyers who were examined gave any evidence which would support or give colour to such a contention. A number of hypothetical cases were put to Mr. Ure which might apply to other cases, but have no application whatever to this case, which is that of the union of two persons fully aware that one of them had only obtained a divorce from a previous marriage in a country not that of the domicil, which divorce the general law of Scotland will not recognize, both on account of the forum in which it was obtained and on account of the grounds alleged in the

(1) L. R. 3 H. L. 97.

SWINFEN EADY J.
1908
STIRLING, *In re.*
STIRLING *v.* STIRLING.

complaint being considered insufficient. I therefore determine that Walter Stirling died without having had any lawful issue, and that the plaintiff has established his title as the sixth son of the late Thomas Mayne Stirling to the income of the residuary investments, subject, of course, to any prior charges subsisting.

Solicitors: *Collyer-Bristow & Co.; Official Solicitor; Atkey, Clarke & Atkey.*

J. R. B.

SWINFEN EADY J.
1908
May 20.

In re HENSON.
CHESTER *v.* HENSON.

[1905 H. 3276.]

Will—Charge of Debts and Legacies—Implied Power to Sell or Mortgage—Beneficial Devise in Fee to one Executor—Mortgage by Devisee to raise Legacies—Liability of Mortgagee to see to application of Money.

A beneficial devise of land in fee to a devisee who is also an executor, subject to a general charge of debts and legacies, empowers that executor-devisee to sell or mortgage the land and to give a good receipt to the purchaser or mortgagee, who is not bound to see to the application of the purchase or mortgage money even if it is expressed to be raised for the payment of legacies only.

Johnson v. *Kennett*, (1835) 3 My. & K. 624, 630; *Forbes* v. *Peacock*, (1846) 1 Ph. 717, 721; *Stroughill* v. *Anstey*, (1852) 1 D. M. & G. 635, 653; and *Corser* v. *Cartwright*, (1875) L. R. 7 H. L. 731, 736, applied.

In re Rebbeck, [1894] W. N. 68; 42 W. R. 473, distinguished.

It is not necessary that the executor-devisee should expressly purport to execute the conveyance or mortgage in his capacity of executor.

In re Venn and Furze's Contract, [1894] 2 Ch. 101, 114, applied.

SUMMONS to vary Master's certificate.

By his will dated January 24, 1879, a testator, after directing payment of his debts, funeral and testamentary expenses, and after bequeathing certain legacies amounting to 919*l.* 19*s.* and devising a house to his wife for life, devised and bequeathed the residue of his real and personal estate to Henson absolutely, "subject nevertheless to and charged with the payment of my debts funeral and testamentary expenses the before mentioned legacies and the following annuities."

After giving certain annuities during his wife's life the

testator directed Henson to pay four separate sums of 750*l.* to his trustees within six calendar months after his wife's decease to be held by them upon the respective trusts for the respective beneficiaries therein mentioned, and the testator thereby charged the four sums of 750*l.* upon all his real and personal estate. The testator empowered his trustees to give receipts for the before-mentioned sums of money charged on his real estate and for all other moneys directed to be paid or delivered to them by virtue of his will, and declared that such receipts should entirely exonerate the persons taking the same from liability to see to the application or disposition of the moneys therein mentioned. The testator appointed Adcock and Henson trustees and executors of his will. The testator died on May 18, 1882.

By a mortgage dated November 20, 1882, and made between Henson of the first part, Adcock and Henson of the second part, and Timms of the third part, reciting the testator's will and his seisin of Blackacre, and reciting that Henson, being desirous of raising 700*l.* to assist in paying the legacies bequeathed by the will, had requested Timms to lend him that sum, which Timms had agreed to do upon having repayment secured in manner thereinafter mentioned, and that Adcock had consented to join for the purpose of testifying his consent to the loan and confirming the conveyance, it was witnessed that, in consideration of 700*l.* paid by Timms to Henson with the privity of Adcock testified by his executing those presents the receipt whereof Henson thereby acknowledged, Henson covenanted to repay Timms the sum of 700*l.* with interest as therein mentioned. It was further witnessed that Henson as beneficial owner did thereby grant and convey and Adcock (so far as he had any interest in the premises) did thereby as trustee convey and confirm Blackacre unto and to the use of Timms, his heirs and assigns, by way of mortgage to secure the said sum of 700*l.* and interest, the right of redemption being reserved to Henson.

The 919*l.* 19*s.* bequeathed in legacies were fully paid in November, 1882, the said sum of 700*l.* being applied pro tanto in that behalf. This mortgage was transferred to Kelsey on February 8, 1883, to William Hallam on September 29, 1893, and to John Hallam on April 5, 1900. By a mortgage dated January 31,

SWINFEN EADY J.
1908
HENSON, *In re.*
CHESTER *v.* HENSON.

1884, and made between Henson of the first part, Adcock and Henson of the second part, and William Hallam of the third part, reciting the testator's will and his seisin of Whiteacre, and reciting that Henson, being desirous of borrowing 1000*l.* to assist in paying the sums bequeathed by the will, had requested William Hallam to lend him that sum, which William Hallam had agreed to do upon having repayment secured in manner thereinafter mentioned, and that Adcock had consented to join for the purpose of testifying his consent to the loan and confirming the conveyance, it was witnessed that, in consideration of 1000*l.* paid by William Hallam to Henson with the privity of Adcock testified by his executing those presents the receipt whereof Henson thereby acknowledged, Henson covenanted to repay William Hallam the sum of 1000*l.* with interest as therein mentioned. It was further witnessed that Henson as beneficial owner did thereby grant and convey and Adcock (so far as he had any interest in the premises) did thereby as trustee convey and confirm Whiteacre unto and to the use of William Hallam, his heirs and assigns, by way of mortgage to secure the said sum of 1000*l.* and interest, the right of redemption being reserved to Henson.

The testator's widow died on May 14, 1884. Adcock died on August 18, 1884. William Hallam died on September 6, 1899, having appointed John Hallam and J. W. Burrows his executors.

By a transfer of mortgage and further charge dated April 5, 1900, and made between J. W. Burrows of the first part, Henson of the second part, and John Hallam of the third part, indorsed on the Whiteacre mortgage, reciting that the 1000*l.* secured by that mortgage belonged in equity to John Hallam and that he had requested J. W. Burrows to release and convey the principal sum and interest and the securities for the same, and reciting that John Hallam had agreed to lend Henson the further sum of 300*l.*, it was witnessed that J. W. Burrows as personal representative of William Hallam assigned the principal sum of 1000*l.* and interest and the full benefit of all powers of sale and other powers and securities for recovering payment thereof to John Hallam absolutely. It was further witnessed that in

consideration of the sum of 1000*l.* so owing by Henson to John Hallam and of the further advance of 300*l.* Henson covenanted to repay John Hallam 1300*l.* with interest as therein mentioned.

It was further witnessed that J. W. Burrows according to his estate or interest in the premises and as personal representative of William Hallam did thereby grant, release, and convey and Henson as beneficial owner did thereby convey and confirm Whiteacre unto and to the use of John Hallam in fee simple, free from all equity of redemption under the original Whiteacre mortgage, but subject to the fresh proviso for redemption thereinafter contained.

The 1300*l.* was in fact applied for Henson's own purposes and not in payment of the trust legacies. He stated that in 1884, when the 1000*l.* was advanced, it was considered that the land was good security not only for the 1000*l.*, but also for the four trust legacies. The greater part of these legacies was still unpaid.

On October 27, 1905, the plaintiff, who was entitled to a share of a trust legacy, issued an originating summons for administration of the trusts of the will. The usual accounts and inquiries were directed, and the estate being insufficient for the payment of the 700*l.* and 1300*l.* mortgages and the unpaid portions of the trust legacies, a special inquiry was directed to ascertain their priorities inter se.

From the Master's certificate, dated April 13, 1908, it appeared that the only debt remaining unpaid was a sum of 900*l.* secured on Greenacre under a mortgage made by the testator on October 29, 1857. The Master certified that this mortgage was prior to the legacies, and no question arose on the point. The Master also certified that the mortgage on Blackacre took priority over the legacies. This also was not disputed, as the money had been duly applied. He also certified that the mortgage and further charge on Whiteacre ranked after the legacies.

John Hallam, the mortgagee of Whiteacre, claimed priority and issued this summons to vary the certificate accordingly.

Micklem, K.C., and *Tomlin*, for John Hallam. A beneficial devise of land to a devisee who is also an executor, subject to a

SWINFEN EADY J.
1908
HENSON, *In re.*
CHESTER v. HENSON.

general charge of debts and legacies, empowers that executor-devisee to sell or mortgage the land and to give a good receipt to the purchaser or mortgagee, who is not bound to see to the application of the money.

The fact that the purchaser or mortgagee knows that all the debts have been paid, or that the money is to be applied in payment of legacies only, is immaterial for two reasons, namely, (*a*) the rule applies to the state of things at the testator's death; (*b*) the implied power to give receipts is based on the testator's intention and does not cease because to the mortgagee's knowledge there are no debts.

Of course, if the money were lent for purposes outside the will, the mortgagee would not get a good receipt; but that was not so in the present case, as the trust legacies as well as the debts were charged on the real estate. These propositions are implied if not actually decided by the judgments in *Johnson* v. *Kennett* (1); *Eland* v. *Eland* (2); *Page* v. *Adam* (3); *Forbes* v. *Peacock* (4); *Stroughill* v. *Anstey* (5); and *Corser* v. *Cartwright*. (6)

Hon. E. C. Macnaghten, K.C., and *Edward Ford*, for the plaintiff. A general charge of debts and legacies no doubt implies a power to sell or mortgage and to give a good receipt for the money even if there are in fact no debts at the date of the transaction or even at the testator's death. The purchaser or mortgagee need not inquire as to the existence of debts; it is not his business. But if he knows there are no debts, or expressly lends the money for the payment of legacies only, the case is different. The cases cited no doubt contain dicta in support of the argument that he will get a good receipt even in that case, but there is no actual decision to that effect. In such a case there is no difficulty in his seeing to the payment of the legacies which are definite sums mentioned in the will, so that the reason for implying power to give a receipt where the money is to be applied in payment of unascertained debts as well as legacies no longer exists.

It is on this ground that a charge of legacies only does not

(1) 3 My. & K. 624, 630.
(2) (1839) 4 My. & Cr. 420, 428.
(3) (1841) 4 Beav. 269.
(4) 1 Ph. 717, 721.
(5) 1 D. M. & G. 635, 653.
(6) L. R. 7 H. L. 731, 736.

imply a power to give a receipt: *In re Rebbeck* (1); and the same principle should be applied where the purchaser or mortgagee knows that the money is to be used for legacies only.

Clayton, for the defendant and other parties attending. The defendant takes no part in the argument. The other parties submit that the form of the mortgages shews that the defendant was borrowing as beneficial owner on his own account and not as executor or trustee.

Schwann, for other parties attending.

Micklem, K.C., in reply.

SWINFEN EADY J. (after stating the facts). The question is whether the mortgage and further charge on Whiteacre take priority over the trust legacies. It is claimed that they take priority on the ground that they were created by Henson, the devisee of real estate charged with debts and legacies, who was also an executor. It is established by numerous authorities that where real estate is charged generally with debts and legacies and devised beneficially to a devisee who is also an executor the purchaser is not bound to see to the application of the purchase-money. The general rule was stated by Lord Lyndhurst L.C. in 1835 in *Johnson* v. *Kennett*. (2) He says: "The general rule, as to which there is no dispute, is this:—Where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase-money. Where debts are charged generally, or where debts and legacies are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase-money. The real estate being, in this case, charged generally with the payment of debts and legacies, would not, therefore, prima facie, in the hands of a purchaser, be liable to the payment of the legacies; but it is said that the debts having been paid, and paid out of the personal estate, and nothing remaining but the legacies, the case falls within the general rule applicable to cases where legacies alone are charged upon the real estate. I find no authority for such a proposition. The rule applies to the state of things at the death of the testator; and if the debts are afterwards paid, and the

(1) [1894] W. N. 68; 42 W. R. 473. (2) 3 My. & K. 624, 630.

SWINFEN EADY J.

1908

HENSON, *In re.* CHESTER *v.* HENSON.

legacies alone are left as a charge, that circumstance does not vary the general rule."

In *Forbes* v. *Peacock* (1), decided in 1846, Lord Lyndhurst L.C. said: "But assuming that the facts relied upon in this case amount to notice that the debts had been paid, yet as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required." That was the case of a trust for sale. "The case then comes to this,—if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not. In the case of *Johnson* v. *Kennett* (2), where it was contended that the rule did not apply, because the debts had been paid before the sale took place, I held that the rule had reference to the death of the testator, and, therefore, that even supposing the debts were paid before the sale took place, and the legacies alone remained as a charge, that circumstance would not vary the general rule."

These cases were referred to in 1852 in *Stroughill* v. *Anstey* (3), a leading case which Lord St. Leonards considered to be one of very great importance in reference to the general practice in conveyancing. Lord St. Leonards L.C. said: "The case must stand upon one of two grounds: either that there are no debts within the knowledge of the purchaser, and then it is indifferent whether there were no debts at the death of the testator or no debts at the time of the purchase, or, which is more satisfactory and open to no ambiguity, on the ground that when a testator, by his will charges his estate with debts and legacies, he shews that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or

(1) 1 Ph. 717, 721.
(2) 3 My. & K. 624, 630.
(3) 1 D. M. & G. 635, 653.

mortgagee: that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means, and the nature of the trust shews that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcileable, and all stand upon one footing, namely, that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator, and drawing none of those fine distinctions which embarrass Courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this Court."

In *Corser* v. *Cartwright* (1), decided in 1875, Lord Cairns L.C. took the same view. He said: "Lord Cranworth, in advising your Lordships' House in the case of *Colyer* v. *Finch* (2), which has also been referred to, said: 'It does not matter that the mortgage to Mr. Finch was not made avowedly'—that is on the face of it—'for the purpose of raising money to pay debts; that is not at all necessary, nor could he be affected, unless it was apparent on the face of the proceeding that it was not, and could not have been, so intended. I very much incline to think, that when a party, the devisee of real estate charged with payment of debts, sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or even whether it is a sale for the purpose of enabling debts to be paid. The old case of *Elliot* v. *Merriman* (3), which is always referred to, before the Master of the Rolls, makes no such distinction as to whether it was expressed to be made for payment of debts or not. If there is a charge on the devisee in fee, if he takes the estate charged with the payment of debts alone, or debts and legacies, and if he sells, the great convenience of mankind requires that it should be just

(1) L. R. 7 H. L. 731, 736.

(2) (1856) 5 H. L. C. 905, 923. The quotation from this report has been verified and corrected.

(3) (1740) 2 Atk. 41; Barn. Ch. 78; 2 W. & T. L. C. 7th ed. 896.

SWINFEN EADY J.
1908
HENSON, *In re.*
CHESTER *v.* HENSON.

as if an executor sells when property comes to him, unless it can be shewn that the purchaser knew that the purchase-money was not going to be so employed, and he was ancillary to something like a fraud, because he may presume that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor by the will.' "

In the present case there was a charge of debts and legacies. It is true it appears on the face of the mortgage of Whiteacre that the 1000*l.* was borrowed to assist in paying the sums bequeathed by the will. But those sums equally with the debts were charged on the real estate, and the devisee could give a good receipt. It was contended that the mortgage was made by Henson in his capacity of beneficial owner and not in his capacity of executor. But in *In re Venn and Furze's Contract* (1) Stirling J. said: " It appears to me that I have the high authority of Lord Cairns and Lord Cranworth for saying that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shews the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity."

This is the case of a mortgage by a devisee of real estate charged with debts and legacies, the devisee being also an executor. In *In re Rebbeck* (2) there was no charge of debts, and that case fell within the first branch of Lord Lyndhurst's rule. In the present case there was a charge of both debts and legacies, and the mortgagee of Whiteacre has established a good title in priority to the legatees. The certificate must be varied accordingly.

Solicitors: *Woolley & Whitfield, for Woolley, Beardsleys & Bosworth, Loughborough; Henry Clarkson & Sons, for Herbert Simpson, Leicester; W. R. Francis, for Bartlett, Young & Murphy, Loughborough; Smith, Rundell & Dods, for J. T. Hincks, Leicester.*

(1) [1894] 2 Ch. 101, 114.

(2) [1894] W. N. 68; 42 W. R. 473.

G. R. A.

SWINFEN EADY J.

1908

May 19, 21.

In re BREWSTER.

BUTLER *v.* SOUTHAM.

[1908 B. 924.]

Will—Direction to pay Debts out of Residue—Specific Devise of Colonial Property—Colonial Death Duty—"Deemed to be a Debt"—Incidence of Duty—Victoria Administration and Probate Act, 1890 (54 *Vict. No.* 1060), *ss.* 102, 103.

A testatrix domiciled in England made an English will appointing English executors and trustees and Colonial executors and trustees.

She devised certain land in Melbourne, Victoria, to her Colonial trustees upon trust to sell the same and to pay or remit the proceeds of sale to her English trustees to be held upon certain specific trusts.

She devised and bequeathed the residue of her real and personal estate to her English trustees upon trust to sell and convert the same into money and thereout to pay (inter alia) her "debts" and to stand possessed of the residue thereof upon certain residuary trusts:—

Held, on the construction of the will, that (*a*) the direction to pay debts out of residue referred to actual debts and did not include local death duty on the Melbourne property, though "deemed to be a debt of the testatrix" by the local law; (*b*) the local death duty and other expenses of realizing the Melbourne property fell on that property and not on residue.

Peter v. *Stirling*, (1878) 10 Ch. D. 279, and *In re Maurice*, (1896) 75 L. T. 415, distinguished.

ORIGINATING SUMMONS.

By her will dated September 21, 1901, a testatrix domiciled in England appointed certain persons (thereinafter called her English trustees) to be executors and trustees of her will. After various legacies and gifts of English property, the testatrix, in exercise of a power under her late husband's will, further appointed certain persons (thereinafter called her Colonial trustees) to be executors and trustees of her will, and gave, devised, bequeathed, and appointed certain land in Melbourne, Victoria, to her Colonial trustees upon trust to sell the same and to pay or remit the proceeds of sale to her English trustees to be held by them upon the trusts therein declared (hereinafter called the Melbourne property trusts).

The testatrix devised and bequeathed all the residue of her

SWINFEN EADY J.

1908

BREWSTER, *In re.*

BUTLER *v.* SOUTHAM.

real and personal estate to her English trustees upon trust to sell and convert the same into money and thereout to pay "my funeral and testamentary expenses and debts and all the legacies bequeathed by this my will or any codicil or codicils thereto (and the duties on such legacies) and to stand possessed of the residue thereof" upon the trusts therein declared (hereinafter called the residuary trusts).

By a second codicil dated February 17, 1905, the testatrix declared that all the legacies bequeathed by her will or any codicil should be paid free of legacy duty.

The testatrix died on January 4, 1907, and in the same year her will was proved in England by the plaintiffs, three of the English trustees.

On February 4, 1908, the will was proved in Victoria by a Colonial trustee.

An ad valorem duty on the value of the Melbourne property was payable in Victoria under the Victoria Administration and Probate Act, 1890 (54 Vict. No. 1060), which provides as follows:

"PART I.—*General Provisions.*

"Sect. 7. The real estate of every deceased person shall be assets in the hands of his executor or administrator for the payment of the duties and fees payable under Part V. of this Act, and for the payment of his debts in the ordinary course of administration; and it shall be lawful for such executor or administrator to sell or mortgage such real estate . . . ."

"PART V.—*Duties on Deceased Persons' Estates.*

"Sect. 102. The duty payable under this Part of this Act shall be deemed to be a debt of the testator or intestate to Her Majesty and shall be paid by any executor or administrator out of the personal estate of the testator or intestate after payment of the testamentary and funeral expenses in priority to all debts of the testator or intestate, and if the personal estate be insufficient to pay such duty, the executor or administrator shall satisfy the same out of the real estate.

"Sect. 103. Every executor and administrator, or administrator with the will annexed shall deduct from each and every

devise bequest and legacy coming to any person under any will an amount equal to the duty upon such devise bequest or legacy calculated at the same rate as is payable upon the estate under this Part of this Act unless the testator shall have made a different disposition as to the payment of the said duty in his will.

"Sect. 104. No probate or letters of administration shall issue from the Master's office until the duty or fee (if any) as the case may be payable under this Part of this Act has been paid . . . ."

The duty was raised by mortgage of the Melbourne property under the Act.

This summons was issued to determine (inter alia) whether the costs of proving the will and codicils in Victoria and the testamentary expenses of the Colonial trustee and the duties payable in respect thereof ought to be borne by the Melbourne property or by the residuary estate in the hands of the English trustees or how otherwise.

Hon. Frank Russell, K.C., and *Underhay*, for the English trustees.

Micklem, K.C., and *Cozens-Hardy*, for persons interested under the residuary trusts. The duty and other expenses must be borne by the Melbourne property. The English trustees have nothing to do with the Melbourne property itself. They are merely entitled to the net proceeds of realization, that is after all expenses, including duties, are paid, and they hold these proceeds not as residue, but on the specific Melbourne property trusts. The appointment of separate executors and trustees for the English and Colonial properties with the separate dispositions thereof is really tantamount to making an English will for the English property and a Colonial will for the Colonial property. This is quite different from a case where there is only one set of executors and trustees who deal with the whole estate, English and Colonial, on one set of trusts.

Hon. E. C. Macnaghten, K.C., and *Riviere*, for other persons interested under the residuary trusts, adopted the same argument.

Owen Thompson, for a person interested under the Melbourne property trusts. The appointment of Colonial trustees is mere

SWINFEN EADY J.
1908
BREWSTER, *In re.*
BUTLER *v.* SOUTHAM.

machinery for convenience of realizing the Melbourne property and has nothing to do with the incidence of the Colonial duty or other expenses which fall on the residue as ordinary costs of administration: *Peter* v. *Stirling* (1); *In re Maurice.* (2)

In *Peter* v. *Stirling* (1) the duty was imposed by the Victoria Duties on the estates of deceased persons Statute, 1870 (34 Vict. No. 388), finally repealed and re-enacted by the Act of 1890. The material sections were practically identical with those in the present case. The pecuniary legacies were not given free of duty, and the residuary legatees contended that the pecuniary legatees must bear the whole English legacy duty, which was not disputed, and must also bear the Colonial duty on the proportion of their legacies attributable to Colonial residue, calculated on the assumption that they were payable rateably out of English and Colonial residue. Malins V.-C. treated the Colonial duty as a debt, and as such payable out of residue.

In *In re Maurice* (2) the contest was between different shares of residue, including Colonial residue in South Australia. The Colonial duty varied with the age of the beneficiaries, so that it made a difference whether the duty was paid out of the estate generally or out of each share. North J. followed *Peter* v. *Stirling* (1) and held that the duty was payable out of the estate generally.

[SWINFEN EADY J. Both cases were really contests between shares of residue. The present case is a contest between a specific devise and residue.]

In the present case the duty is a statutory debt and falls within the express direction to pay debts out of residue. Again, my share of the proceeds of the Melbourne property is a legacy, and I therefore get it duty free.

Charles Garnett, for the acting Colonial trustee.

Austen-Cartmell and *Ward Coldridge*, for other parties.

Micklem K.C., in reply. The direction to pay duties on the legacies obviously refers to English legacy duty. The Colonial duty is only "deemed to be a debt." It was not one of the debts contemplated by the testatrix in the direction to pay debts. It is more like a charge on the property. The point depends on

(1) 10 Ch. D. 279. (2) 75 L. T. 415.

the construction of this particular will, and the cases cited have no application.

SWINFEN EADY J. The question is whether the Colonial duty on the Melbourne property is payable out of that property or out of residue. The duty is imposed by the Victoria Administration and Probate Act, 1890 (54 Vict. No. 1060). [His Lordship read ss. 102 and 103.]

It is contended that as the duty is "deemed to be a debt" of the testatrix it is payable by the English trustees under the direction to pay debts out of residue. But on the true construction of the residuary clause I am of opinion that the Colonial duty is not a debt within that clause. The testatrix, domiciled in England, made an English will giving her residuary property, which did not include the Melbourne property, to certain persons described as her English trustees upon trust to sell and convert the same into money and thereout to pay (inter alia) her funeral and testamentary expenses and debts. By the expression "debts" she meant actual debts or moneys she owed, and did not intend to include something not really a debt, but only "deemed to be a debt" under the Colonial Act. As a matter of construction I therefore hold that the testatrix has not directed the Colonial duty to be paid out of residue. The testatrix has directed her Colonial trustees to sell the Melbourne property, which involves proving the will in Victoria, clearing the duty, and paying expenses of realization, and then to pay or remit the proceeds, clearly meaning the net proceeds after paying duty and all expenses, to the English trustees, to be held on the Melbourne property trusts.

The result is that the duty and expenses of realization, including the costs of proving the will in Victoria and the testamentary expenses of the Colonial trustee, fall on the Melbourne property and are not payable out of English residue.

Solicitors: *Todd, Dennes & Lamb; Blyth, Dutton, Hartley & Blyth; Marshall & Pridham; Bridges, Sawtell & Co.; C. F. Lampard; Mackrell, Maton, Godlee & Quincey.*

G. R. A.

NEVILLE J.
1908
May 26.

WILSON *v.* HARPER.

[1907 W. 2873.]

Commission — Contract — Personal Contract — Death of Party — Commission payable "as long as we do Business."

The defendants agreed with W. to pay him 5 per cent. commission on all accounts introduced by him so long as they did business with the persons he placed on their books:—

Held, that the commission on accounts introduced by W. continued to be payable to his executors after his death so long as the defendants continued to do business with the persons introduced by him.

On May 19, 1890, Joseph Wroe, a commercial traveller residing in Manchester, wrote to the defendants, Messrs. William Harper & Son, a firm of ironfounders carrying on business at Willenhall, a letter which, so far as material, was as follows: "I suggested to your Mr. Harper, jun., that I could and would secure you a few good customers if you could allow me 5 per cent. on all accounts that I introduced so long as you did business with them. . . . . The business you would do direct after the first order. . . . . Further, any inquiries you might receive I should be glad to follow up at your desire, and before you appointed an agent I should expect you to give me the refusal."

On August 9, 1890, the defendants' firm wrote the following answer: "Since you were here last we have turned up your letter of May 19 in which you offer to secure us some orders for malleable castings for 5 per cent. commission on all goods supplied to customers introduced by you. We shall be pleased to pay you the said 5 per cent. as long as we do business with them you place on the books. Of course that will be on the amount we receive from customers."

Wroe procured numerous orders for the defendants, and they paid him commission regularly under the agreement until his death on November 22, 1906.

His executors claimed that commission should continue to be paid to his estate after his death, on orders received after his

death, from customers originally introduced by him. The defendants refused to pay, and on October 3, 1907, the executors brought this action asking for a declaration that the agreement was not determined by the death of Joseph Wroe, and that the defendants were liable to pay upon all orders received after his death from customers introduced by him.

The defendants contended that the agreement was determined by the death. They also contended that the effect of the two letters was varied by a letter of the plaintiffs dated May 22, and that by the conduct of the parties the original relation between them had been altered and Wroe had become the defendants' general agent. The judge held upon the evidence that the letter of May 22 was never sent.

Peterson, K.C., and *Methold*, for the plaintiffs. The words of the contract are perfectly plain. The defendants agreed to pay 5 per cent. on the accounts introduced by Wroe, "so long as we do business with them you place on the books." There is no reason why this payment should cease on Wroe's death.

Jenkins, K.C., and *Disturnal*, for the defendants. The real question is whether, having regard to the nature of this employment, the contract was not determined on Wroe's death. It was a contract of agency, and the general rule is that such a contract is determined by death: *Farrow* v. *Wilson*. (1)

This is commission for work done as agent, and it is wholly unreasonable to construe the contract so that the commission should take the form of an annuity continuing after the death of the agent so long as the firm continued to do business. There is here no mention of executors or administrators, and in a contract for personal service as this "pay me" means "pay me during my life." There is no case in which the question has arisen on the death of the person entitled to commission. It has sometimes arisen on his dismissal, and in *Bilbee* v. *Hasse & Co.* (2) and *Salomon* v. *Brownfield* (3) it was held that the commission continued to be payable, but in those cases the contract was in such terms that

(1) (1869) L. R. 4 C. P. 744.
(2) (1889) 5 Times L. R. 677; affirmed C. A., *Times* newspaper, Jan. 16, 1890.
(3) (1896) 12 Times L. R. 239.

NEVILLE J. 1908 WILSON v. HARPER.

the Court found an intention that the remuneration should continue after the services had ceased. In *Barrett* v. *Gilmour & Co.* (1) and *Morris* v. *Hunt & Co.* (2) it was held that the commission was not payable after the dismissal.

NEVILLE J. I think that this case simply involves a question of construction of two letters. [His Lordship read the letters of May 19 and August 9 and continued:—]

That seems to me to be the beginning and the end of the transaction which concerns the present case, and I think that this letter of August 9 is what is sometimes spoken of as a commission note and nothing else. It was simply saying to a man, "If you introduce business I will pay you 5 per cent. upon the business introduced"; and it seems to me that all question as to duration is set at rest by the words which have been used here, "So long as we do business with them you place on our books." I think that shews quite clearly that the commission was not only in respect of orders given through the agent—if you like to call him so, as in one of the cases that has been cited to me—but that there was a commission of 5 per cent. to be paid as the price of an introduction on all business done by the firm with the customers introduced.

Now it seems to me quite impossible to say that you are to read in business documents of this kind an implied limitation that no remuneration is to be paid to the executors of one of the contracting parties; because if you read "you" as meaning "you, and not your representatives after your death," the result would be that earned commission, that is, commission in respect of orders already executed, would not be payable because there is nobody to receive; the man is dead and you are not bound to pay his executors. It appears to me, therefore, that you must read the agreement to pay "you" in the ordinary sense in which those words are used, that is, "to pay you, and after your death to pay your executors." I think what you are to pay is quite clear. You are to pay 5 per cent. on the orders received from firms introduced by Mr. Wroe. Therefore it seems to me it does not matter whether he was dead or alive, although after he is dead

(1) (1901) 6 Com. Cas. 72. (2) (1896) 12 Times L. R. 187.

the agreement is determined in this sense, that no further customers can be introduced by anybody on the terms of this document.

It seems to me that the agreement might have been determined at any time by notice by Harper & Son, and from that moment no commission could be recovered in respect of any fresh business introduced; but I do not think that would have affected the right to receive commission in respect of business from firms previously introduced, and I do not think that death puts an end to that any more than the determination of the agreement by Harper & Son by notice in Mr. Wroe's lifetime would have done.

It is said that this was an agreement for agency, and that the agreement is determined by the death of the agent because it is an agreement for personal services. I do not think it was an agreement for agency at all. There is a reference to Mr. Wroe's being appointed agent, and it appears that some time afterwards he held himself out as the agent of the firm and so held himself out with, at all events, the subsequent authorization of the firm itself. They allowed him to do so, and he also did a considerable amount of work, mainly with regard to the business with the firm which he had introduced, and it was obviously as much in his interest as in the interest of Harper & Son that he should do so, because the better they performed their contracts the greater likelihood there was of the firms introduced by him giving fresh orders. He was clearly concerned in facilitating business between the firms introduced by him and the firm of Harper & Son, and it appears that he also occasionally did other work for the firm for which no remuneration was paid him.

It seems to me that that position between the parties does not in the least interfere with or affect the agreement, which had been entered into by the firm with him in respect of firms introduced by him, that they would pay 5 per cent. on the orders received so long as the customers remained theirs.

I think, therefore, the plaintiffs must succeed, but the declaration asked by the statement of claim that the agreement was not determined by the death is incorrect. I think it was determined by the death. I think it is the remuneration that survived,

NEVILLE J. 1908 WILSON v. HARPER.

full consideration having been given for that in the work already done.

After some conversation the declaration was made in the following form :—

That, notwithstanding the death of Joseph Wroe, the defendants are liable to his executors to pay a commission of 5 per cent. on all goods supplied to and paid for by customers introduced by the said Joseph Wroe as long as the defendants do business with such customers.

Solicitors: *Dangerfield & Blythe, for S. J. Barlow, Manchester; Flux, Leadbitter & Neighbour, for Rowland Tildesley, Willenhall.*

J. R. B.

PARKER J. 1908 *April* 1, 2, 3, 6, 7, 8; *May* 15.

ELLISTON *v.* REACHER.

[1907 E. 388.]

Vendor and Purchaser—Restrictive Covenants—Building Scheme—Rights of Purchasers inter se—Restrictions contained in unexecuted Engrossment—Reservation of Right to dispense with Restrictions—Release by accepting less onerous Restrictions—Injunction—Damages.

Restrictive covenants may be enforced by one purchaser or his successor in title against another or his successor irrespective of the dates of the respective purchases, on the principles of *Renals* v. *Cowlishaw*, (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866, and *Spicer* v. *Martin*, (1888) 14 App. Cas. 12 (1.) if both plaintiff and defendant derive title under a common vendor, and (2.) if before selling the lands now owned by plaintiff and defendant the vendor laid out his estate or a defined portion thereof (including the lands of the plaintiff and defendant) for sale in lots subject to restrictions intended to be imposed on all the lots and which, though varying in details as to particular lots, are consistent and consistent only with a general scheme of development; and (3.) if those restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold —whether or not for the benefit also of the land retained by the vendor —the vendor's object in imposing the restrictions being in general to be gathered from all the circumstances, including in particular the nature of the restrictions, and it being easily inferred from the fact that a general observance of the restrictions is calculated to enhance the value of the several lots offered for sale that the vendor intended the restrictions to

be for the benefit of all the lots even though he may retain other lands the value of which might be similarly enhanced; and (4.) if both plaintiff and defendant or their predecessors purchased from the common vendor on the footing that the restrictions were to enure for the benefit of the other lots included in the scheme, whether or not for the benefit of the land retained by the vendor, this fourth point being readily inferred if the first three points be established, provided the purchasers have notice of the facts involved in them, but difficult if not impossible to establish if the purchase is made in ignorance of any material part of those facts. When the four points are established the community of interest imports in equity the reciprocity of obligation which each purchaser contemplates when he purchases.

A building society acquired the title to the F. estate in 1860, in which year part of the estate was plotted out for sale in numbered lots which were shewn on a sale plan of the society, on which were printed the conditions on which it was proposed to sell the estate. These conditions were the same as those contained in the engrossment mentioned below, except that they did not state with whom the restrictive covenants contained in the proposed deed were to be entered into, but the plan was identical with the plan annexed to the engrossment. The society did not complete its title to the property till early in January, 1861, when the F. estate was vested in R. and C., who were trustees for the society. A few days afterwards an engrossment was prepared, bearing date January 16, 1861, of an indenture (never executed) between the persons whose names and seals were stated to be but were not subscribed in the second schedule thereto and R. and C. Each of the scheduled parties was to covenant with the other of them and separately with R. and C. to observe the restrictions in the first schedule to the engrossment. The plan annexed shewed the F. estate, part of which was plotted out for sale in numbered lots, and the rest marked as reserved. One of the restrictions was that on no lot should any hotel, tavern, public-house or beer-house be built, or any house used as such without the vendors' consent.

By two deeds executed in December, 1861, and April, 1866, R. and C. conveyed two of the numbered lots to predecessors in title of the defendants, subject to the covenant of the grantee thereinafter contained to observe the restrictions contained in an indenture of January 16, 1861 (which the Court held to be the unexecuted engrossment). By two deeds executed in December, 1861, containing identical covenants, other numbered lots were conveyed by R. and C. to predecessors in title of the plaintiffs. All the four conveyances were in identical printed forms. Some of the defendants were owners of lots, and the other of them, their lessee, used buildings on the lots as an hotel. C. in 1880 was party to conveying part of the land on which the hotel stood to a predecessor in title of the plaintiffs other than E., which predecessor entered into restrictive covenants which did not extend to an hotel:—

Held (1.) that, notwithstanding the common vendors' right to dispense with the adherence to the restrictions, E. could enforce the restrictions by injunction; (2.) that the other plaintiffs were debarred from maintaining

PARKER J.
1908
ELLISTON v. REACHER

the action; (3.) that absence of proof of substantial damage was not an answer to a claim for an injunction.

Osborne v. *Bradley*, [1903] 2 Ch. 446, distinguished.

THIS was an action to restrain the defendants from using a certain building in Brownlow Road, Felixstowe, as an hotel contrary to certain restrictive covenants which were alleged to affect the property. The defendants, other than the defendant Quilter, were the legal personal representatives of one Crowle, who at his death was owner of the property in fee simple. The defendant Quilter was a lessee of his co-defendants, and was actually doing that of which the plaintiffs complained. The land on which the building used as an hotel stood previously formed part of an estate known as the Felixstowe Estate, belonging to the Conservative Benefit Building Society (which was in liquidation at the time of the action). The covenants on which the plaintiffs based their claim to relief were contained in two indentures dated respectively December 27, 1861, and April 19, 1866. By each of these indentures part of the land on which the hotel now stood was conveyed by Lord Ranelagh and Mr. J. C. Cobbold, who were trustees of the building society (therein called "the vendors"), to a predecessor in title of the defendants. Each indenture contained a recital of a contract for the sale of the property thereby conveyed subject to the covenant thereinafter contained. In each deed the land conveyed was described as a plot of ground part of a larger estate called the Felixstowe Estate. In each deed the plot of ground conveyed was delineated on the plan drawn on the margin of the indenture, and was therein referred to in the one case as lot 26 and in the other as lot 25. Each indenture contained a covenant by the purchaser that he and all persons claiming under him should from time to time and at all times observe, perform, and fulfil the covenants, restrictions, and agreements as to the mode of building on and the occupation of the premises conveyed, and otherwise, contained or referred to in an indenture dated January 16, 1861, and expressed to be made between the several persons whose names and seals were subscribed and set in the second schedule thereto of the first part, and the vendors of the second part. Each indenture also

contained a covenant by the vendors to produce (inter alia) the last-mentioned indenture. There was evidence that the deeds affecting the Felixstowe Estate always remained in the custody of the society, although the estate was vested in the society's trustees, and the liquidator of the society, when called upon to produce the deeds referred to in the covenants to produce above mentioned, in all other cases produced what were undoubtedly the deeds referred to, but in the case of the indenture of January 16, 1861, he produced a document which, though conforming in all respects to the description contained in the conveyances, was not, strictly speaking, an indenture at all, because it was not executed, but was an engrossment only. Although it was unexecuted it bore date January 16, 1861, and was expressed to be an indenture made between the several persons "whose names and seals are subscribed and set in the second schedule" thereto of the first part, and Lord Ranelagh and J. C. Cobbold of the second part. There were recitals in it to the effect that the several parties of the first part had purchased from the parties of the second part the several lots of ground distinguished on the map or plan thereunto annexed by the numbers set opposite the names of the several purchasers in the second schedule, and that upon the occasion of the several purchases it was agreed that the several parties of the first part should enter into the covenants thereinafter contained. It was then witnessed that, in pursuance of the said agreement and in consideration of the premises, each of the parties of the first part, for himself, his heirs, executors, administrators, appointees, and assigns, covenanted with the other of them, his heirs, appointees, and assigns, and also, as a separate covenant, with Lord Ranelagh and J. C. Cobbold, their heirs and assigns, (inter alia) to observe, perform, and fulfil all and every the covenants, restrictions, and agreements as to the mode of building on and the occupation of the lots purchased by or conveyed to them, expressed or contained in the first schedule thereto. The map or plan annexed to the document shewed the Felixstowe Estate, a portion of it being plotted out for sale in lots, and the rest being marked as reserved. Each lot in the plotted portion was numbered, and those lots which were numbered 26 and 25 were

PARKER J. 1908 ELLISTON v. REACHER.

identical with the lots conveyed to the defendants' predecessor by the indentures of December 27, 1861, and April 19, 1866. Among the restrictions contained in the first schedule was a restriction to the effect that on no lot should any hotel, tavern, public-house or beer-house be built, or any house used as such, or any manufacture carried on, without the consent of the vendors, their heirs or assigns. His Lordship found that the unexecuted engrossment was the document described in the conveyances as an indenture of January 16, 1861, and it was admitted that the consents required before buildings could be used as an hotel had not been obtained.

The plaintiffs were also the owners of lands formerly part of the Felixstowe Estate, and also claimed through Lord Ranelagh and J. C. Cobbold, the trustees of the building society. They conveyed the plaintiff Elliston's land to his predecessor in title by an indenture dated December 27, 1861, which was in the same form as the indenture under which the defendants claimed and contained similar covenants, the property conveyed being described as lot 27. The lands of the other plaintiffs were conveyed by the trustees to their predecessor in title by a deed of the same date and form and were described as lots 30 and 31. Both deeds referred to the so-called indenture of January 16, 1861, and the numbering of the three lots corresponded with the numbers on the plan thereto annexed.

The Felixstowe Estate contained about ten acres close to the sea and appropriate for development for residential purposes, and the lotted portion on the annexed plan was nearest the sea and divided on the plan into four blocks, each containing a number of lots for sale. Two of the blocks contained more expensive and better lots than the other two blocks, one of them containing lots 22 to 35 inclusive and including the lands which at the time of the action belonged to the plaintiffs and defendants respectively.

The restriction contained in the first schedule to the unexecuted engrossment regulated the building line on the several frontages, the value of the houses to be erected on the several lots, and the purposes for which the houses were to be used. No hotel, tavern, public-house, beer-house, or manufactory was to

be allowed on any lot without the vendors' consent, and there was to be no shop or warehouse on any lot in either of the two principal blocks whether such consent was given or not. The Conservative Benefit Building Society was formed from a political motive in order to facilitate the qualification of persons for the parliamentary franchise, and with this view it acquired the Felixstowe Estate and other properties. Part of the estate was plotted out for sale in lots in 1860, and a sale plan shewing the various lots, with the conditions on which it was proposed to sell them printed on it, was prepared and exhibited under the circumstances mentioned in the judgment of Parker J. The society did not, however, complete its title to the property until early in January, 1861, a few days before the date of the unexecuted engrossment.

The society had a printed form of conveyance for use on the sale of any lot, and this form was used on the sales of the lots to the predecessors of the plaintiffs and defendants respectively.

In 1861 the property on the unselected plots was advertised for sale to the general public, and a number of the plots were conveyed to the purchasers by conveyances in the printed form.

His Lordship found that the predecessors of the plaintiffs and defendants respectively had notice of the intention of their common vendors that the restrictions should enure for the benefit of all the lots offered for sale, and that they purchased on that footing.

The defendants not only contested the right of the plaintiffs to enforce the restrictions, but also set up the defence that they had lost their equitable rights, if any, by laches or acquiescence.

The defendants also set up the defence that there had been such a complete change in the character of the neighbourhood or such a departure from the building scheme that its object could no longer be obtained, and that the restrictions imposed by it were no longer enforceable.

The defendants also set up that the plaintiffs other than Elliston had lost their right, if any, to enforce the restrictive covenants under the circumstances stated in his Lordship's judgment.

The action was tried by Parker J. on April 1, 2, 3, 6, 7, and 8, 1908.

PARKER J. 1908 ELLISTON v. REACHER.

Buckmaster, K.C., and *Tomlin*, for the plaintiffs. The unexecuted engrossment was the document referred to in the conveyance to the defendants' predecessor in title, and they took subject to the restrictions imposed by it and are just as much bound by them as if they had expressly covenanted to conform to the restrictions. A restrictive covenant need not be express, but may be collected from the transaction of contract and sale: *Renals* v. *Cowlishaw* (1), approved by the House of Lords in *Spicer* v. *Martin* (2); and see *Mackenzie* v. *Childers* (3); *Davis* v. *Leicester Corporation*. (4) Where the deed is not executed the rights, though not legal, are equitable: *Formby* v. *Barker*. (5) The present case is distinguishable from *Osborne* v. *Bradley* (6), where the plots of land to be bound were not defined. The plaintiffs are not obliged to prove damage in order to obtain an injunction: *Richards* v. *Revitt* (7); *Collins* v. *Castle*. (8) The landowner who stipulates for the imposition of the restriction stipulates that he "shall be relieved from all anxiety arising from" the forbidden thing, "and the feeling of anxiety is damage": *Kemp* v. *Sober* (9); *Lord Manners* v. *Johnson*. (10)

Where the benefit of the restrictive covenant has been once annexed to land, it runs with the land in equity without proof of special bargain or representation on the assignment of the land: *Rogers* v. *Hosegood*. (11)

A few former omissions to enforce the restrictions against owners of some other lots will not prevent the Court from enforcing the restrictions: *Knight* v. *Simmonds*. (12)

Levett, K.C., *Alexander Grant, K.C.*, and *Whinney*, for the defendants. We say (1.) that there never was any implied bargain as to there being a scheme for building or conditions of user; (2.) that if there was a scheme, it has been so varied that there has been an abandonment of it; (3.) that the plaintiffs have not suffered any damage.

(1) 9 Ch. D. 125, 129; 11 Ch. D. 866.
(2) 14 App. Cas. 12.
(3) (1889) 43 Ch. D. 265.
(4) [1894] 2 Ch. 208.
(5) [1903] 2 Ch. 539, 547.
(6) [1903] 2 Ch. 446.
(7) (1877) 7 Ch. D. 224.
(8) (1887) 36 Ch. D. 243.
(9) (1851) 1 Sim. (N.S.) 517, 520.
(10) (1875) 1 Ch. D. 673, 679.
(11) [1900] 2 Ch. 388.
(12) [1896] 1 Ch. 653; [1896] 2 Ch. 294.

A building scheme in order to be binding must be rigid and bind all the lots on the estate: *Spicer* v. *Martin* (1); *Sidney* v. *Clarkson*. (2) The reservation of the right to dispense with the performance of the conditions prevents there being such a thing as a scheme. Stirling J. decided that the retainer by the vendor of part of the property was an important element in determining whether it was his intention that the restrictions should be for the common advantage of the several purchasers: *In re Birmingham and District Land Co. and Allday* (3); but *Nottingham Patent Brick and Tile Co.* v. *Butler* (4) shews that where the vendor retains part of the land there is no scheme.

Where the vendor retains a power to waive or vary the covenants with regard to unsold lots, it is open to argument that no scheme exists: *Osborne* v. *Bradley*. (5)

Because an intending purchaser is shewn a plan of an estate in lots and a printed form of agreement, he is not entitled to assume that the whole estate is governed by a rigid building scheme: *Tucker* v. *Vowles*. (6)

The sale plan does not state with whom the covenant was to be entered into, and the document containing the restrictions contained no covenant, inasmuch as it was never executed; the Court cannot look at the document. If there ever was a scheme it was abandoned, or at any rate it cannot be enforced, having regard to the changes which have been made. Moreover, the plaintiffs, having lain by knowing that an hotel was being built, cannot now ask the Court for relief by injunction.

The plaintiffs other than Elliston claim through J. C. Cobbold. If the defendants entered into binding covenants, Cobbold was one of the covenantees, and joined in a conveyance of February 7, 1880, to predecessors in title of the defendants. That conveyance contained covenants by the purchasers against the use of any building to be erected on the premises as an inn or beer-house, but said nothing about an hotel, and it is contended that this released the property from any previous restrictive covenants, and that the plaintiffs other than Elliston cannot enforce

(1) 14 App. Cas. 12.
(2) (1865) 35 Beav. 118.
(3) [1893] 1 Ch. 342.
(4) (1886) 16 Q. B. D. 778.
(5) [1903] 2 Ch. 446, 454.
(6) [1893] 1 Ch. 195.

PARKER J. 1908 ELLISTON v. REACHER.

these covenants. Lastly, we say that the plaintiffs must prove substantial damage in order to obtain an injunction: *Sayers* v. *Collyer* (1); *Shelfer* v. *City of London Electric Lighting Co.* (2); *Colls* v. *Home and Colonial Stores, Ld.* (3)

Buckmaster, K.C., in reply. In a case like this it is impossible to obtain direct evidence as to all the facts, but there is enough to warrant the inference that every purchaser relied on the expected benefit to be conveyed by the scheme, including the restrictions against hotels and shops. Everything shews that both the vendors and the purchasers were to be bound by the restrictions. The dispensing power given to the vendors is not inconsistent with a binding scheme.

The restrictions may be enforced either on the principle of *Mackenzie* v. *Childers* (4) or as being in the nature of negative easements: *In re Nisbet and Potts' Contract.* (5) The present case is distinguished from *Tucker* v. *Vowles* (6) and *Osborne* v. *Bradley* (7), because the plan in this case was made for the purposes of the scheme. The effect of *Sayers* v. *Collyer* (1) is that a plaintiff may be disentitled to relief by his acquiescence. If there is a negative covenant, "all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant": per Lord Cairns L.C. in *Doherty* v. *Allman.* (8)

There has been no laches on the part of the plaintiffs.

Cur. adv. vult.

May 15. PARKER J. (after stating the object of the action). The plaintiffs claim the benefit of the covenants in question on the principles laid down in the cases of *Renals* v. *Cowlishaw* (9) and *Spicer* v. *Martin.* (10) I have, therefore, first to ascertain what covenants affect the defendants' land, and secondly, if I find that there are any covenants which preclude the use of such land for the purposes of an hotel, whether such

(1) (1884) 28 Ch. D. 103.
(2) [1895] 1 Ch. 287.
(3) [1904] A. C. 179, 193.
(4) 43 Ch. D. 265.
(5) [1906] 1 Ch. 386.
(6) [1893] 1 Ch. 195.
(7) [1903] 2 Ch. 446, 454.
(8) (1878) 3 App. Cas. 709, 720.
(9) 9 Ch. D. 125; 11 Ch. D. 866.
(10) 14 App. Cas. 12.

covenants can be enforced at the suit of the plaintiffs. The only covenants on which the plaintiffs base their claim to relief are those contained in two indentures dated respectively December 27, 1861, and April 19, 1866. [His Lordship stated the effect of these deeds and the evidence as to the custody of the document of January 16, 1861, and its production by the liquidator, and continued:—] The defendants objected that, however certain it might be that the document produced was the document referred to in the conveyances, I could not look at it at all, because it was not an indenture. This objection appears to me to fail. If the document referred to in the conveyances can be identified, the mere fact that it is wrongly described as an indenture is in my judgment immaterial, and on this question of identity the nature and contents of the document are of first-rate importance. [His Lordship stated the nature and effect of the document of January 16, 1861, and continued:—] Among the restrictions contained in the first schedule is a restriction to the effect that on no lot should any hotel, tavern, public-house or beer-house be built, or any house used as such, or any manufacture be carried on, without the consent of the vendors, their heirs and assigns; so that if the document I am considering is in fact the document described in the conveyances as an indenture of January 16, 1861, the defendants' land is subject to a covenant precluding the use of the buildings thereon for the purpose of an hotel without certain consents, which it is admitted have not been obtained. I do not think there can be any reasonable doubt that the unexecuted engrossment bearing date January 16, 1861, produced by the liquidator of the building society, is the document of that date referred to in the conveyances and therein described as an indenture. It comes from the proper custody, and there is evidence that the society never had in its possession any other document which could be the document referred to in the conveyance. This conclusion will be found to be corroborated by other facts to which I shall hereafter refer. I hold accordingly that the land comprised in the conveyances of December 27, 1861, and April 19, 1866, and now vested in the defendants, was by those indentures subjected to the restrictive covenants which have been and are being

PARKER J. broken by the use of the buildings thereon for the purposes of an hotel.

1908

ELLISTON v. REACHER.

I pass, therefore, to the consideration of the question whether the plaintiffs can enforce these restrictive covenants. In my judgment, in order to bring the principles of *Renals* v. *Cowlishaw* (1) and *Spicer* v. *Martin* (2) into operation it must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor; (2.) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development; (3.) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a

(1) 9 Ch. D. 125; 11 Ch. D. 866. (2) 14 App. Cas. 12.

vendor may naturally be expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point. It is also observable that the equity arising out of the establishment of the four points I have mentioned has been sometimes explained by the implication of mutual contracts between the various purchasers, and sometimes by the implication of a contract between each purchaser and the common vendor, that each purchaser is to have the benefit of all the covenants by the other purchasers, so that each purchase is in equity an assign of the benefit of these covenants. In my opinion the implication of mutual contract is not always a perfectly satisfactory explanation. It may be satisfactory where all the lots are sold by auction at the same time, but when, as in cases such as *Spicer* v. *Martin* (1), there is no sale by auction, but all the various sales are by private treaty and at various intervals of time, the circumstances may, at the date of one or more of the sales, be such as to preclude the possibility of any actual contract. For example, a prior purchaser may be dead or incapable of contracting at the time of a subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them. It is, I think, enough to say, using Lord Macnaghten's words in *Spicer* v. *Martin* (1), that where the four points I have mentioned are established, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase.

It appears in the present case that the plaintiffs, like the defendants, are the owners of lands which formerly formed part of the Felixstowe Estate, and also claim both through Lord Ranelagh and J. C. Cobbold, the trustees of the building society. The land now owned by the plaintiff Elliston was conveyed by

(1) 14 App. Cas. 12.

PARKER J. 1908 ELLISTON v. REACHER.

these trustees to his predecessor in title by an indenture dated December 27, 1861, which is in the same form as the indentures under which the defendants claim title, and contains precisely similar covenants, the property conveyed being described as lot 27. The land now owned by the other plaintiffs was conveyed by the same trustees to their predecessor in title by an indenture also dated December 27, 1861, in the same form and containing precisely similar covenants, the property conveyed being in one case described as lot 30, and in the other case as lot 31. The indenture of January 16, 1861, referred to in each of the indentures under which the plaintiffs claim title is obviously the same indenture as that referred to in the conveyances under which the defendants claim title. In other words, it is the unexecuted engrossment produced by the liquidator of the building society. The lots described in the conveyances are the same as the lots similarly numbered on the plan annexed to the unexecuted engrossment. If the restrictions contained in the first schedule to the engrossment be examined with the plan annexed thereto, it is, I think, manifest that the building society or their trustees had, prior to the dates of sale of the various lands owned by the plaintiffs and the defendants respectively, laid out a defined portion of the Felixstowe Estate for sale in lots subject to restrictions to be imposed on all the lots, and that these restrictions, though differing in detail as to particular lots, are consistent and consistent only with a general scheme for the development of the lotted portion of the estate.

The Felixstowe Estate was a small estate of about ten acres situate close to the sea and appropriate for development for residential purposes. The portion shewn as lotted on the plan annexed to the unexecuted engrossment is that nearest the sea. It is on this plan divided into four blocks, each containing a number of lots for sale. The two chief blocks have frontages to Brownlow Road, and the lots on these blocks are larger, more highly priced, and more suitable for houses of a better class than the lots in the two remaining blocks. The lots in the block on the south side of Brownlow Road, which are numbered 22 to 35 inclusive and include the lands now owned by the plaintiffs and defendants respectively, have also a frontage to Hamilton Terrace,

on the further side of which come the cliffs, and then the open sea. The smaller lots contained in the two remaining blocks respectively have frontages in the one case to Ranelagh Road and in the other case to Cambridge Road, and are respectively situate in the extreme western and the extreme eastern boundaries of the lotted portion of the estate. They are less suitable for the erection of houses of the better class. The restrictions contained in the first schedule of the engrossment regulate the building line on the several frontages, the value of the houses to be erected on the several lots, and the purposes for which such houses are to be used. There can be no hotel, tavern, public-house or beer-house, or any manufactory on any lot without the consent of the vendors. There can be no shop or warehouse on any lot comprised in the two principal blocks whether such consent be given or not, and there are minor conditions relating to fences and open spaces. All these conditions are of a character which is usual on the sale of an estate in lots for residential purposes, and are, in my opinion, such as would be likely to be imposed if the intention was to increase the value of the lots by the imposition of a common scheme of restrictions for the benefit of the various purchasers. Further, having regard to the form of the engrossment which contemplates mutual covenants between the purchasers to observe the restrictions, I think it is clear that, at any rate when the engrossment was prepared, the purchasers were intended to have the benefit of the common scheme. It is true that the vendors reserve the power of sanctioning an hotel, tavern, public-house, beer-house, or manufactory on any lot, and that there is also a provision that as to any portion of the estate not disposed of by the vendors they reserve the power to deal with the same without reference to and independently of the restrictions. Assuming—and indeed I think this is the true construction—that the last-mentioned provision relates not only to that portion of the estate which is marked "reserved" on the plan, but also to any lot on the lotted portion which is not eventually sold subject to the common restrictions, still I do not think that the various dispensing powers, as they were called in argument, are sufficient to negative the intention, otherwise clear on the engrossment, that, so far as the various lots were sold subject to the

PARKER J. 1908 ELLISTON v. REACHER.

common restrictions, such restrictions should enure for the benefit of all the lots so sold.

Having dealt with the matter thus far by simply comparing and examining the title deeds of the plaintiffs and defendants respectively and considering the inferences which arise therefrom, I propose now to consider the various other facts which were proved at the hearing.

The Conservative Benefit Building Society, though, as far as its expressed objects and constitution were concerned, an ordinary benefit building society, appears to have been formed from a political motive in order by facilitating the purchase of land in small lots to qualify as many people as possible, and, if possible, people holding Conservative views, for the parliamentary franchise. With this object the society acquired, among a number of other properties, the Felixstowe Estate. Part of this estate was plotted out for sale in lots in the year 1860, and a sale plan, shewing the various lots, the roads, and other particulars, was prepared by the surveyor of the society, the conditions on which it was proposed to sell the estate being printed on the plan itself. According to these conditions the various lots were in the first instance to be offered for sale to members of the society according to their priorities of rights of choice as shewn in the books of the society, each member having the right to borrow seven-eighths of the purchase-money from the society. Any unselected lots were then to be offered to the public, and any purchaser could apparently obtain the right to borrow a portion of the purchase-money from the society by becoming a member. This sale plan is precisely similar to the plan annexed to the unexecuted engrossment, and the restrictions contained in the conditions are the same as the restrictions contained in the first schedule to the same engrossment. The conditions also provide that each purchaser on completing his purchase should enter into a deed of covenant (inter alia) for securing the performance of the conditions, but it is not stated with whom the covenants contained in this deed are to be entered into. The conditions reserve to the vendors the same dispensing powers as those contained in the engrossment.

Looking at this sale plan and the conditions thereon alone,

without reference to any other facts, I think I ought to draw the same inferences as I have already drawn from the plan endorsed on, and the conditions contained in, the engrossment. There is no difference, except that it is not stated on the sale plan with whom the covenants to be contained in the proposed deed are to be entered into. It was argued that, having regard to this difference, any inference that the restrictions were intended to be for the benefit of the various lots shewn on the sale plan was negatived by the existence of the dispensing powers. Of course the existence of those dispensing powers is a matter for consideration in determining whether the common scheme of restrictions is or is not intended to be for the benefit of the lots offered for sale, but I do not think it is conclusive, or even has any very great bearing one way or the other. These powers may well have been reserved so as to give the vendors rights which otherwise could not be effectually exercised because of the existence of a scheme for the common benefit of the various lots. It does not appear to me to be so likely that their insertion is due to a desire to shew that there was no such scheme. If there were no such scheme, no dispensing power would be necessary, and though, of course, clauses of this nature might be inserted ex cautela, there would be no reason on this hypothesis why the particular dispensing power should be confined to hotels, taverns, public-houses, beer-houses, and manufactories and should not also have extended to shops and warehouses.

Taking the three classes into which Farwell J. divided restrictive covenants in his judgment in *Osborne* v. *Bradley* (1), it was not suggested on behalf of the defendants that the restrictions mentioned on the sale plan could have been intended to be for the personal benefit of the vendors of the building society. It was argued, however, that they might have been imposed merely for the benefit of those parts of the estate which were reserved and not lotted for sale. Their nature, however, is such that if they be for the benefit of the reserved lands they must a fortiori be for the benefit of the plots offered for sale and likely to enhance the value of those plots, and I arrive at the conclusion, therefore, that when the sale plan was prepared the

(1) [1903] 2 Ch. 446.

PARKER J. 1908 ELLISTON v. REACHER.

vendors' intention was that the restrictions to be imposed on each lot were to enure for the benefit of the other lots; and, further, I think the true inference is that the unexecuted engrossment was prepared as the deed proposed to be executed by the various purchasers pursuant to the conditions on the sale plan, and the form of the unexecuted engrossment corroborates this conclusion.

Proceeding with the facts as we know them, it appears that, though the lots were according to the sale plan to be offered to the members of the society in August, 1860, the society did not complete its title to the property until early in January, 1861. The unexecuted engrossment bears date a few days after such completion. It appears also that the society prepared and procured to be printed a form of conveyance for use on the sale of every lot, and that such printed form was in fact used on the sales of the lots purchased by the predecessors in title of the plaintiffs and defendants respectively. Further, a copy of the sale plan was pasted on canvas and hung up in the offices of the society, and as and when plots were sold such plots were marked off on the plan in Indian ink. Most if not all of the plots were so marked off as sold before the end of the year 1865. A complete record of all dealings with the estate was kept in the society's books, but, unfortunately, those books have been destroyed by order of the Court made in the liquidation, and the two officers of the society who gave evidence were first employed by the society in the year 1865 and can only depose to the society's usual course of business and to the facts I have already stated. Beyond such inference, if any, as can be drawn from the society's usual practice, we do not know whether the lots were in fact offered in the first instance to its members in accordance with the conditions on the sale plan, nor what members, if any, exercised their rights of selection. We do know, however, that in 1861 the property or the unselected plots was or were advertised for sale to the general public, intending purchasers being referred to the solicitors of the society as the persons who could supply plans of the estate. We also know that plans of the estate, being copies of the sale plan to which I have already referred, were struck off in large numbers and

retailed at 1*s.* 6*d.* apiece by Mr. Downing, as agent of the society, to the public. Mr. Claydon, the society's agent at Ipswich, used to send down intending purchasers to see the property, referring them to Mr. Downing for particulars. Mr. Downing used to shew them the plans, and some of the persons to whom he so shewed the plans became purchasers of various lots. We know, too, that a large number of the lots so purchased were conveyed to the respective purchasers by conveyances in the same printed form as that used in the case of the lots sold to the predecessors of the plaintiffs and defendants respectively. There is no evidence that any lot was sold and conveyed otherwise than on the sale plan and by a conveyance in the same printed form. Mr. Downing, who has had frequent dealings with a number of lots, has always made use of the sale plan, copies of which he still has in his possession, and of copies of the unexecuted engrossment, to shew intending purchasers of lands formerly part of the Felixstowe Estate the restrictions subject to which they would buy. Mr. Crowle, the defendants' immediate predecessor in title, saw in this way both the sale plan and a copy of the engrossment before he purchased the property on which the hotel complained of now stands. The defendants have a copy of the engrossment among their title deeds, though it is not clear how or when it was obtained.

Under all the circumstances of the case it is in my opinion sufficiently established not only that the predecessors of the plaintiffs and the defendants respectively had notice of the intention of their common vendors that the restrictions in question should enure for the benefit of all the lots offered for sale, but that they made their respective purchases on that footing. Had they executed the unexecuted engrossment the contrary could not have been alleged. Had the unexecuted engrossment contained a covenant with the vendors only, and not with the purchasers of other lots, no inference to the contrary could have been drawn from the non-execution of the engrossment any more than such an inference could have been drawn from the non-execution by the purchasers of their several conveyances.

The argument to the contrary must in that case have turned

PARKER J. 1908 ELLISTON v. REACHER.

solely on the general dispensing power, and the improbability, having regard to the uncertainty thereby introduced, of a purchaser having contracted on the footing that he should be liable on his own covenants to, and have the benefit of the covenants of, the purchasers of other lots, which, having regard to the dispensing power, he could not certainly identify—an argument which prevailed in *Osborne* v. *Bradley* (1), but is in this case sufficiently answered by the actual form of the engrossment. The real difficulty is as to the inference to be drawn from the non-execution of this document. Was it left unexecuted because of any change in the original intention of the vendors, or because the purchasers refused to complete on the footing thereby contemplated, or was its non-execution due to the fact that it was not really necessary to execute it at all? In my opinion the true inference is that, notwithstanding the non-execution of this document, the predecessors of the plaintiffs and defendants respectively both purchased on the footing thereby contemplated, namely, that the covenants entered into by them respectively should enure for the benefit of all others who purchased lots on the same terms. I hold, therefore, that the plaintiffs are, so far as the principles of *Renals* v. *Cowlishaw* (2) and *Spicer* v. *Martin* (3) are concerned, entitled in equity to enforce the covenants in question.

The next question is whether the plaintiffs have lost this equitable right by any laches or acquiescence. In my opinion the defendants, on whom the burden lies, have not proved any laches or acquiescence on the part of any of the plaintiffs. Mr. Crowle apparently commenced building the house now used as an hotel with the intention of using the same as a boarding-house, and it was not suggested on the defendants' behalf that a boarding-house could be an hotel within the meaning of the covenant. Mr. Crowle was a great advocate of temperance, and complained because his architect had put the words "private hotel" on the building plans.

Mr. Elliston saw these plans, or copies of them, at the offices of the local authority. There is, however, no evidence

(1) [1903] 2 Ch. 446. (2) 9 Ch. D. 125, 129; 11 Ch. D. 866.
(3) 14 App. Cas. 12.

that he had his attention called to the words "private hotel." In the correspondence he refers to the building shewn on the plans as a proposed boarding-house, and we know that a board containing the words "first-class boarding-house" was placed on the premises during the earlier stages of the erection of those buildings. This board subsequently, either shortly before or after Mr. Crowle's death (probably, I think, after), was replaced by a board with the words "private hotel," and this in its turn was replaced by a board with the words "first-class hotel." But there is no evidence that the plaintiff's attention was directed to this change of boards, and as soon as ever a licence was applied for it was opposed by him. If the evidence of laches or acquiescence in the case of the plaintiff Elliston is weak, it really amounts to nothing at all in the case of his co-plaintiffs.

It was next suggested that there has been such a complete change in the character of the neighbourhood, or such a departure from the building scheme, that its object can no longer be attained, and that, therefore, the restrictions imposed by the scheme are no longer enforceable. In my opinion this defence also fails. It appears to me that the character of the neighbourhood is the same as it was in 1860 and 1861, and that its character has been preserved, in part at any rate, by reason of the existence of the restrictions, and, further, the deviations from the restrictions which have been proved are quite trivial in their nature and not such as, assuming the plaintiffs could have prevented the same, would be evidence of abandonment on their part of the benefit secured to them by the scheme.

Lastly it was suggested that in the case of the plaintiffs (other than the plaintiff Elliston) they have lost their right to enforce the restrictive covenants under the following circumstances. On February 7, 1880, H. C. Cobbold was the owner of lot 26, or part thereof; and T. C. Cobbold was the owner of lot 25, or part thereof, under a voluntary conveyance dated in 1875 from his father, J. C. Cobbold, and J. C. Cobbold was himself entitled to a small strip of land now comprised in the site of the hotel in question, but which originally formed part of the site of a churchway (subsequently diverted) between lots 26 and 25. By

PARKER J. 1908 ELLISTON v. REACHER.

an indenture dated February 7, 1880, to which all these three gentlemen were parties, and which recites the two indentures of December 27, 1861 and April 19, 1866, under which the defendants claim title, (1.) H. C. Cobbold conveyed to a purchaser that portion of lot 25 now owned by the defendants; (2.) T. C. Cobbold and J. C. Cobbold conveyed to the same purchaser that portion of lot 25 now owned by the defendants; and (3.) J. C. Cobbold conveyed to the same purchaser the strip of land formerly part of the churchway. There are the usual covenants for title on the part of the conveying parties, and there are certain express restrictive covenants by the purchasers with J. C. Cobbold alone, including a covenant against the use of any building to be erected on the premises as an inn or beer-house. These, however, are not the covenants the plaintiffs are seeking to enforce; and, further, I have no evidence that the hotel in question is an inn or beer-house within the recognized meaning of those expressions.

It appears that at the date of this indenture H. C. Cobbold was the legal owner of lot 30 and that portion of lot 31 now owned by the plaintiffs other than the plaintiff Elliston, but was under contract to sell the same to J. C. Cobbold; and, further, that J. C. Cobbold had settled or affected to settle the same property to uses under which there was a subsisting life interest, although the equitable reversion remained in him. He subsequently acquired the legal estate, and it is through him that the plaintiffs other than the plaintiff Elliston claim title.

It was contended under those circumstances that the indenture of February 7, 1880, operated to release the property conveyed thereby from the burden in equity of the restrictive covenants which the plaintiffs are seeking to enforce so far as concerns lot 30 and that part of lot 31 now owned by the plaintiffs other than the plaintiff Elliston. These plaintiffs cannot be in any better position than J. C. Cobbold, through whom they claim title; and the question, therefore, is whether after the conveyance of February 7, 1880, J. C. Cobbold, as owner in equity of lot 30 and part of lot 31, or H. C. Cobbold on his behalf, could have enforced the restrictive covenants in respect of which this action is brought against the purchaser under that conveyance. I have

come to the conclusion that according to the true meaning of the conveyance of February 7, 1880, though the purchaser took with notice, and was therefore bound by the covenants contained in the conveyances of December 27, 1861, and April 19, 1866, he was to be at liberty, so far as the vendors were concerned, to deal with the property purchased by him in any way he liked, provided he observed the covenants into which he is expressed to enter with J. C. Cobbold, and that J. C. Cobbold could not thereafter, nor could H. C. Cobbold on his behalf, have enforced any other restrictive covenants. In my opinion, therefore, the action, so far as the plaintiffs other than the plaintiff Elliston is concerned, fails.

The only other point raised by counsel for the defendants is the question whether I ought under the circumstances to grant an injunction, or to award damages in lieu of an injunction, under the powers first conferred on the Court by Lord Cairns' Act, 21 & 22 Vict. c. 27. The defendants contend that the plaintiffs have not proved any substantial damage, and that in default of proof of such damage no injunction ought to be granted. I do not think this is a correct proposition of law. As was said by Farwell J. in *Osborne* v. *Bradley* (1), the rule enunciated by Lord Cairns in *Doherty* v. *Allman* (2) prima facie applies to all restrictive covenants, and though it may well be that if the plaintiffs' right be equitable only, as in the present case, the Court will more readily award damages instead of an injunction, it is in my opinion clear from the case of *Richards* v. *Revitt* (3) that the absence of proof of substantial damages is not by itself sufficient to warrant that course being adopted. Of course in exercising its discretion the Court is bound to consider all the circumstances of the case, and I see no reason in the present case why the plaintiff Elliston should not be entitled to maintain the residential character of this estate by preventing any house thereon being used for the purposes prohibited by the building scheme. If an injunction be refused in the present case, I doubt whether he could hereafter prevent the user of any house on the estate for any of such purposes, and he might have to

(1) [1903] 2 Ch. 446. (2) 3 App. Cas. 719.
(3) 7 Ch. D. 224.

PARKER J. 1908 ELLISTON v. REACHER.

submit to manufactories or shops being opened all along Brownlow Street or Hamilton Terrace.

Something was suggested as to the action not being in reality the action of the plaintiffs, but of the owner of some rival hotel in the neighbourhood, but there is absolutely nothing in the evidence before me to support the truth of this suggestion, and I see no reason to doubt the plaintiffs' bona fides in the matter.

Something also was suggested as to the hardship an injunction would entail on the defendants. I do not think there will be any such hardship. Mr. Crowle purchased with full knowledge of the restrictions in question, and he covenanted with his vendor to abide by them. The defendants other than the defendant Quilter are the legal personal representatives of Crowle. Quilter took his lease, or agreement for a lease, with full notice not only of the original restrictions, but of Mr. Crowle's covenant. The breach of covenant on the part of the defendants has therefore been quite deliberate, and as the building in question was built for a boarding-house, it cannot be said that the defendants have made any great expenditure on the faith of being allowed to use it as an hotel.

I have come to the conclusion, therefore, that I ought to grant an injunction at the suit of the plaintiff Elliston, though as far as the other plaintiffs are concerned the action fails on other grounds.

The defendants have succeeded against the plaintiffs other than the plaintiff Elliston. I propose, therefore, to dismiss the action so far as those plaintiffs are concerned. So far as the plaintiff Elliston is concerned, I propose to grant him an injunction restraining the defendants from using, or permitting to be used, any building on any part of the land conveyed by the indentures of December 27, 1861, or April 19, 1866, as an hotel, tavern, public-house, or beer-house.

With regard to the costs, after giving the matter careful consideration, I have come to the conclusion that the fair and proper order to make under all the circumstances will be that the defendants pay the plaintiffs' costs of the action, except so far as they have been increased by the plaintiffs against whom the action is dismissed having been made co-plaintiffs with the

plaintiff Elliston, and by any evidence directed to proving the case of those co-plaintiffs as distinct from the case of the plaintiff Elliston. I do not think it is a case for giving the defendants any costs.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for Cobbold, Sons & Co., Ipswich.*

Solicitors for defendants: *Turner & Co.*

F. E.

LORD CHESTERFIELD *v.* HARRIS.

[1906 C. 2036.]

Fishery—Prescription in a que Estate—Profit à prendre in alieno solo—Presumption of Legal Origin.

A prescription in a que estate for a profit à prendre in alieno solo without stint and for commercial purposes is unknown to the law.

Therefore, where by way of defence to an action of trespass by riparian proprietors, the alleged trespass consisting in fishing in a non-tidal reach of a river of which the plaintiffs claimed to be the owners, the defendants set up a prescriptive right to a free fishery or common of fishery vested in the freehold tenants of a certain manor or hundred whose freeholds were situate in any of the parishes adjoining the river, and proved that they and their predecessors in title as such freeholders in exercise of such alleged right for three centuries past had openly and notoriously fished from boats with nets for salmon and other fish in the portion of the river in question and sold the fish so caught in the market:—

Held, that the Court could not presume a legal origin for the alleged right.

APPEAL from a decision of Neville J. (1)

The action was brought by the Earl of Chesterfield and Mrs. Alice Madeline Foster for a declaration that the defendants Harris and Bailey were not entitled to fish in any portion of the river Wye belonging to either of the plaintiffs and an injunction to restrain them from trespassing on the plaintiffs' lands and from fishing in and carrying away fish from the plaintiffs' portions of the river.

The Earl of Chesterfield was tenant for life in possession of

(1) [1908] 1 Ch. 230.

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS.

divers lands in the parishes of Holme Lacy, Ballingham, and Dewchurch, in the county of Hereford, situate on the west side of and abutting on the river Wye; and his co-plaintiff, Mrs. Foster, was tenant in fee simple in possession of divers lands in the parishes of Sollers Hope and Brockhampton in the same county, situate on the east side of and abutting on the Wye. The lands of the plaintiffs where they respectively abutted on the river were opposite to each other for a considerable distance, the Earl of Chesterfield's lands being situate on the right bank of the river, and Mrs. Foster's lands on the left. The plaintiffs alleged that as riparian owners they were entitled between them to the whole bed of that portion of the river where their lands were opposite to each other, and that they as such riparian owners were the only persons entitled to take fish therein; and they further alleged that the defendants, though repeatedly forbidden to do so, persisted in fishing therein and had on numerous occasions caught and carried away large quantities of salmon and other fish. This portion of the river was non-tidal.

The defendants, who were fishermen, alleged that they were freeholders of the hundred or manor of Wormelow, the defendant Harris being the owner of a freehold tenement in the parish of King's Caple and the defendant Bailey being the owner of a freehold tenement in the parish of Hentland. The defendants admitted the acts complained of, but they denied that the plaintiffs were entitled to the bed of the river or to any exclusive right of fishery therein, and alleged that the whole bed of the river for some seven miles, extending from a place called Blackwall Ditch on the north to a place called Gorse Acre (formerly Goose Acre) Gate at Strangford on the south, which included the stretch of water in question, was within the hundred or manor of Wormelow and was vested in the lordship of the said hundred or manor subject to the rights of the freeholders in the same hundred or manor to free fishery or common of fishery therein. They further alleged that they and their respective predecessors in title from time immemorial before action brought had enjoyed as of right as freeholders of the said hundred or manor of Wormelow without interruption free fishery or common of

fishery in the said stretch of water with boats and with the right of fastening their nets to the banks of the river; alternatively they claimed to be entitled to the said free fishery or common of fishery by virtue of a lost grant. They also pleaded that by custom of the said hundred or manor of Wormelow they and all other freehold tenants thereof whose freeholds were situate in any of the parishes or townships adjoining the river Wye had been from time immemorial and were now entitled to use and enjoy the said free fishery or common of fishery. There were five parishes in the said manor or hundred adjoining the portion of the river in question in this action, namely, Ballingham, Bolston, Hentland, Sellack, and King's Caple.

The history of the manor of Wormelow, and of the manors of Ballingham and Bolston, which were vested in the Earl of Chesterfield, depended upon a series of ancient documents which are sufficiently referred to in the judgments of the Court of Appeal. The defendants relied particularly upon certain perambulations of the manor or hundred of Wormelow and presentments made to the court leet dated respectively June 8, 1639, April 11, 1815, and June 10, 1816. These documents shewed that the river from Blackwall Ditch to Gorse Acre Gate was within the limits of the manor or hundred, and that throughout the whole length of the portion of the river claimed by the plaintiffs in this action the eastern boundary of the manor or hundred followed the eastern or left bank of the river, and they defined the free fishery in the manner claimed by the pleadings.

The evidence established that for at least three centuries before the date of the action the freeholders of the manor or hundred in the parishes adjoining the river had openly in the exercise of their alleged rights fished for salmon and other fish in the stretch of water in question and sold the fish so caught in the market, and that although attempts had been made periodically during the last century to restrain them, those attempts had not succeeded.

Neville J. came to the conclusion that the right claimed by the defendants was legally capable of proof and that it was fully established by the evidence; he accordingly dismissed the action.

The plaintiffs appealed.

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS.

Upjohn, K.C., *T. T. Methold*, and *Stuart Moore*, for the appellants. Assuming that the respondents on the evidence have established the existence of any prescriptive right in fact (which is not admitted), such prescriptive right is obviously void in law. They claim a right of common of fishery, a right to fish in this river without stint and without reference to the character of the dominant tenement. They claim the right to fish whether there be a house on the tenement or not, and also the right to take all the fish they catch to market and sell them. They rest their case on the fact that they are freeholders within certain parishes in a particular hundred, and they make their claim by prescription in a que estate. It is well settled that such a claim can only be maintained with respect to the character of the claimant's estate and cannot give an unlimited right. Such a right can only be appurtenant to an ancient messuage and can only be for the benefit of the tenement for which it is enjoyed. Here the respondents have no ancient messuage, one result of which is that there is no stint, and they are so acting as to destroy the subject-matter of the right. There is no connection between the enjoyment of the right and the requirements of the dominant tenement. The respondents can only prescribe for the right to catch fish to be consumed on the premises; they cannot prescribe for the right to take fish and sell them in the market. Any servitude which is appurtenant to a dominant tenement cannot be used except for the purpose of that dominant tenement. This prescription is therefore bad on the face of it: Co. Litt. 122b; Blackstone's Commentaries, vol. ii., pp. 34, 35; Vin. Abr., vol. iv., tit. "Common," letter I. plac. 3; Williams on Commons, pp. 81—83, 259; *Hayward* v. *Cannington* (1); *Dowglas* v. *Kendall* (2); *Cheedley* v. *Mellor* (3); *Clayton* v. *Corby* (4); *Bailey* v. *Stephens* (5); *Edgar* v. *Special Commissioners for English Fisheries*. (6) This doctrine that a profit à prendre in alieno solo must be used in connection with the dominant tenement comes out very strongly in cases where there has been an alteration in the

(1) (1667) 2 Keb. 290, 311; 1 Sid. 354; 1 Lev. 231.
(2) (1609) Cro. Jac. 256.
(3) (1666) 1 Sid. 313.
(4) (1843) 5 Q. B. 415.
(5) (1862) 12 C. B. (N.S.) 91.
(6) (1870) 23 L. T. 732, 737.

dominant tenement: *Costard and Wingfield's Case* (1); *Luttrel's Case.* (2) Neville J. has relied on *Goodman* v. *Saltash Corporation* (3) as contradicting the proposition that the grant of a right to fish appurtenant to land without stint is bad; but that case, as is distinctly shewn both by Lord Selborne (4) and by Lord Cairns (5), has nothing to do with profit à prendre or prescription or custom, but is a case of charitable trust. *Lord Rivers* v. *Adams* (6) shews that no grant could be presumed in such a case as this, where a grant in terms covering the usage established by the evidence would be bad in law. The appellants have a sufficient title to sue. They have shewn a title to the bed of the river in accordance with the ordinary presumption in the case of riparian owners: Hargrave's Law Tracts, Part I. cap. I. But even if they fail in shewing that, possession is clearly proved, and that is all that is required to support an action of trespass. [They also referred to *Rigg* v. *Earl of Lonsdale.* (7)]

Levett, K.C., Micklem, K.C., and *J. G. Wood*, for the respondents. The respondents' claim does not involve the establishment of any title to the soil of the river, but if it can be shewn that the soil of the river is vested in the lord of the manor or hundred of Wormelow and not in the riparian owners, then the appellants cannot maintain this action. The appellants do not shew that between them they do own the soil of the river. The enjoyment of these fishing rights has been exercised so long and so openly by these freeholders that it strongly points to the existence of a legal origin. The documentary evidence is sufficient to enable the Court to assume that either the King or some immediate tenant in capite from him made a grant which included these fishing rights as appurtenant to the freeholders' lands in these five parishes. All this land was originally terra regis, held under ancient demesne, and the strong probability is that the King held this manor. The old Saxon hundred had been turned into a fief, and this fief had been cut up into other manors, and the grant of fishing rights came from the King to his own men.

(1) (1588) 2 Leon. 44.
(2) (1601) 4 Rep. 86a.
(3) (1882) 7 App. Cas. 633.
(4) 7 App. Cas. 637, 641.
(5) Ibid. 648.
(6) (1878) 3 Ex. D. 361.
(7) (1857) 1 H. & N. 923, 935.

C. A. 1908 CHESTERFIELD (LORD) v. HARRIS.

In Doomsday Book there is a hundred of Wormelow, and as early as 20 Edward I. the men of the King by proceeding in quo warranto claimed a common of fishery in the river immediately above and below Blackwall Ditch and also immediately below Strangford : this seems to shew that this part of the river was a free fishery held in common by the freeholders of the manor. The documents as far back as 1609 shew that the lord of the manor exercised jurisdiction over the river, and the survey and perambulations of 1639 shew the whole of this stretch of the river to be within the manor of Wormelow, then vested in the King, who had power to grant a right of fishing like this to the freeholders.

The authorities seem to shew that there can be, as appurtenant to a freehold tenement, a right to fish without stint. The appellants' right to fish is not disputed, but they are not entitled to the exclusive right which they claim. In the case of a common of fishery where there is no individual grant, there must have been a stint, but where a grant of fishing is made to each individual freeholder, as appurtenant to his freehold, then each freeholder is entitled to a right of fishing without stint. A right of fishing like this, a profit à prendre, can be appurtenant to a freehold, and can be granted to individual freeholders : *Warwick* v. *Queen's College, Oxford.* (1) This shews the rights of the individual grantee as distinguished from customary rights. The test of reasonableness does not apply to a grant like this in the same way as it does to a custom. A custom must, to be good, be reasonable ; a grant need not. Reasonableness does not apply to prescription or grant as it does to custom : *Goodman* v. *Saltash Corporation* (2) ; *Wickham* v. *Hawker.* (3) The will and power of the grantor is not fettered : *Earl De La Warr* v. *Miles* (4), where claims by each and every of a particular class of persons are discussed.

The lord may prescribe for himself and his tenants to take fowl in the warren of another : *Davies' Case* (5) ; and it is no objection to say that the prescription is too large. From this it would seem that there can be a profit à prendre which might

(1) (1871) L. R. 6 Ch. 716.
(2) 7 App. Cas. 633, 642, 646.
(3) (1840) 7 M. & W. 63, 78.
(4) (1881) 17 Ch. D. 535, 585.
(5) (1688) 3 Mod. 246.

leave the lord nothing. A plea of prescription for common in a que estate is good: *Clark* v. *King*. (1) The question whether a right of fishing may be claimed as appurtenant to any corporeal hereditament is discussed in Paterson's Fishery Laws, 2nd ed. p. 57; *Hayes* v. *Bridges* (2); Stuart Moore on Fisheries, p. 70. From these authorities it seems clear that a profit à prendre like this right of fishing can be appurtenant to a freehold. What the respondents claim is a right to fish in common with other grantees of this right: this is therefore not a common of fishery, and the cases on common of pasture of turbary or estovers do not apply. The cases relied on by the appellants are all cases of custom and not of prescription. *Valentine* v. *Penny* (3), *Malcomson* v. *O'Dea* (4), *Dowglas* v. *Kendall* (5), and *Cheedley* v. *Mellor* (6) are all distinguishable on this ground, there is nothing in any of them equivalent to the grant of an individual right to fish.

The Court can presume, therefore, a grant to each tenant of a right to fish appurtenant to his freehold, which need not be limited to user for the tenement; or it can presume a grant from the Crown as lord of the manor of Wormelow, and such a grant would incorporate the freeholders quoad the grant: *Willingale* v. *Maitland* (7); *Chilton* v. *London Corporation*. (8)

The appellants, in order to succeed, must shew an exclusive right. They claim this right as riparian owners, but the documents shew that this part of the river is within the limits of the manor of Wormelow, and that displaces the presumption that the riparian owners own the river ad medium filum aquæ. [They also referred to *Seymour* v. *Lord Courtenay* (9) and Woolrych on Waters, 2nd ed. p. 126.]

Upjohn, K.C., in reply. It is said that the bed of the river is vested, not in the appellants, but in the lord of the manor of Wormelow, but that would be no answer to the action if true, assuming that the appellants have proved a possessory title. But, further, the perambulations relied on by the respondents

(1) (1789) 3 T. R. 147.
(2) (1795) 1 Ridg. L. & S. 390.
(3) Noy, 145.
(4) (1863) 10 H. L. C. 593.
(5) Cro. Jac. 256.
(6) 1 Sid. 313.
(7) (1866) L. R. 3 Eq. 103.
(8) (1878) 7 Ch. D. 735.
(9) (1771) 5 Burr. 2814.

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS.

were perambulations not of the manor but of the hundred. Wormelow was a manor which included several sub-manors, but it was also a hundred which included not only the manor of Wormelow, but two other manors, Ballingham and Bolston, which the documents shew were held direct from the Crown and therefore could not be included in Wormelow Manor. The burden is on the respondents to displace the presumption that the riparian owners are owners of the soil of the river ad medium filum: *Lamb* v. *Newbiggin* (1); *Micklethwait* v. *Newlay Bridge Co.* (2); *Blount* v. *Layard* (3); *Duke of Devonshire* v. *Pattinson* (4); *Ecroyd* v. *Coulthard* (5), and they have not discharged that burden.

Assuming that the appellants have established their right to sue, the question remains whether the respondents have made good their claim to a profit à prendre, and it is said that a charter ought to be presumed. But a lawful origin must be reasonably possible, and the Court will not presume a grant for the express purpose of evading the common law: *Attorney-General* v. *Simpson* (6); *Goodman* v. *Saltash Corporation.* (7) Then it is said that this is not a common of fishery, but a separate right to a number of individuals to fish in common; but in *Robinson* v. *Duleep Singh* (8), where a similar argument was used, James L.J. said that he was unable to appreciate it. *Wickham* v. *Hawker* (9) was a case of a right in gross and was so treated by Lord Blackburn in *Goodman* v. *Saltash Corporation.* (10) It is true that one plea claimed a right appurtenant, but that point was not thoroughly dealt with, and in that case there was no question of stint or no stint. In *Davies' Case* (11) the objection to the right was not that there was no stint, but that there were too many people to exercise it. *Malcomson* v. *O'Dea* (12) shews that the terms "free fishery" and "common of fishery" are

(1) (1844) 1 Car. & K. 549.
(2) (1886) 33 Ch. D. 133.
(3) (1888) [1891] 2 Ch. 681 n., 689 n.
(4) (1887) 20 Q. B. D. 263.
(5) [1898] 2 Ch. 358.
(6) [1901] 2 Ch. 671, 698.
(7) 7 App. Cas. 633, 639, 654.
(8) (1878) 11 Ch. D. 798, 814.
(9) 7 M. & W. 63, 78.
(10) 7 App. Cas. 654.
(11) 3 Mod. 246.
(12) 10 H. L. C. 593, 619.

synonymous. This is a common of fishery, and the authorities shew that a common of fishery is subject to the same incidents as all other profits à prendre in alieno solo.

Levett, K.C., replied on the cases cited in reply.

Cur. adv. vult.

June 27. COZENS-HARDY M.R. This is an appeal from the judgment of Neville J. raising many and difficult questions of real property law. The plaintiffs sue for trespass as owners of the bed of the river Wye below Blackwall Ditch, opposite Bolston and part of Ballingham. It is admitted that Lord Chesterfield is owner of the land on the right bank of this reach of the river, and that Mrs. Foster is owner of part of the land on the left bank of this reach opposite to Lord Chesterfield's land; but it is not admitted that either of them owns any part of the bed of the river. The trespass complained of is that the defendants, who are admitted to be freeholders within the manor of Wormelow, have fished with boats and nets in this reach. The defendants do not claim the soil of the bed, but they assert that they have a profit à prendre in alieno solo, not in gross, but in a que estate as appurtenant to their freehold tenements; and they justify the alleged trespass on this ground. Neville J. has dismissed the action, and against this judgment the plaintiffs appeal. It is not necessary for the plaintiffs to establish that the property in the bed of the river is in them. It is sufficient for the purpose of the present action to establish possession, and in my opinion there is ample evidence of possession. Leases granted by Lord Chesterfield or his predecessors for a considerable period, coupled with the receipt of rent for fishing rights, are the only acts of possession which the nature of the case admits of. The acts of possession by Mrs. Foster are, no doubt, less clear and strong, her adjacent land having been acquired as recently as 1892, but I think they suffice. The acts of the defendants, who do not even allege that they are in possession of the bed, are in no way inconsistent with the possessory title of the plaintiffs. But although, as I have said, possession is sufficient for the purposes of the plaintiffs' title in this action, I think it is desirable, and indeed almost

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Cozens-Hardy M.R.

necessary with a view to the defendants' case, to ascertain, if possible, in whom the bed of the river is vested. For the sake of simplicity, I will deal only with that part of the river where Mrs. Foster's land is immediately opposite Lord Chesterfield's land. Now it is clear that there is a presumption that where a river divides two properties the true line of division is the middle of the stream, although there may be no reference to the mid-stream and no plan to support the presumption. On the other hand it is clear that this is only a presumption, which may be rebutted by the contents of the title deeds or by the surrounding circumstances at the date of the conveyances of one or both of the properties. In the present case the title deeds of the plaintiffs give no assistance, except that Lord Chesterfield produces a lease in 1648 of "one nette fishing in the river of Wye within the manor and lordship of Ballingham." The plaintiffs substantially rely upon the presumption. The defendants seek to rebut the presumption by shewing that this reach of the river was within the manor or hundred of Wormelow, the left bank of the river being its boundary, and they argue that it is absurd to suppose that the lord when he granted land on the right bank to Lord Chesterfield's predecessors would have granted one moiety of the river with that land, thus retaining the other moiety without any means of access, and that it is equally absurd to suppose that he granted the left moiety of the stream to Mrs. Foster's predecessors in title, in whose land he had no interest; and they argue that the only reasonable inference is that the lord retained the whole bed. It seems to me that this contention on the part of the defendants cannot be supported. Lord Chesterfield's property on the right bank is known as Ballingham and Bolston. He is lord of these two manors, the origin and history of which can be traced with reasonable certainty. It appears that Ballingham was a manor held of the King in capite and was not a sub-manor held of the lord of the manor of Wormelow. This distinction is expressly drawn in an inquisition post mortem in 1601, on the death of John Scudamore, and there is nothing to throw any doubt upon this fact. This seems to strike at the root of the defendants' argument, for Ballingham was not granted by the lord of the

manor of Wormelow; and there is no reason for supposing that, as between the original grantee on the left bank and the original grantee on the right bank, the middle of the stream was not the dividing line. The inference to be drawn from Bolston is not quite so strong, but in my view it is consistent with the same conclusion. If the bed of the river in Ballingham, or opposite Ballingham, is not in the lord of the manor of Wormelow, it is scarcely conceivable that the bed in Bolston, or opposite Bolston, is in the lord. I have not forgotten the strong evidence of the perambulations in 1639 and 1816, the accuracy of which I accept. They prove to my satisfaction that the perambulators crossed the river at Blackwall Ditch and proceeded down the left bank of the river to a point below the reach in question. But I have come to the conclusion that these were perambulations not of the manor of Wormelow but of the hundred of Wormelow, a tract of country extending over several parishes and separate manors. If I am right in the view that Ballingham is not, and never was, part of the manor of Wormelow, it follows that the perambulations, which included Ballingham, cannot have been of the manor, but must have been of the hundred. They purport to be of the "hundred or manor," and there is much confusion on this point from the earliest times. So far as my limited knowledge goes, a perambulation of a hundred is not usual; but there is no reason why a hundred, as well as a parish or a manor, should not thus have its bounds ascertained. The result is that in my opinion the legal presumption of ownership must prevail, and that it is not established that any part of the bed of the river in the reach in question is or was vested in the lord of the manor of Wormelow.

It remains to consider the nature and extent of the right claimed by the defendants; and I approach the consideration with an anxious desire to support, if it be possible, a right which I am satisfied has been not only claimed but also exercised openly and continuously far beyond living memory, and for at least three centuries. As I have already stated, the defendants do not allege that the bed of the river is vested in a trustee for them, and they do not assert that they are fishing as owners. This being so, it is not worth while

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Cozens-Hardy M.R.

to consider whether such a title could be presumed as was supported in *Haigh* v. *West*. (1) The defendants claim only a right to fish as a profit à prendre, and that is the only claim we can deal with. The defendants plead that by custom of the hundred or manor of Wormelow the defendants and all other the freehold tenants thereof whose freehold is situate in either or any of the parishes or townships adjoining the river Wye have been from time immemorial and now are entitled to use and enjoy a free fishery or common of fishery in the portion of the river in question, which they say forms part of the hundred or manor of Wormelow. It is plain that a profit à prendre cannot be claimed by custom—*Gateward's Case* (2)—and the case has been argued on the footing of a prescriptive right appurtenant to the freehold tenements in five parishes, of which Ballingham and Bolston are two. The documentary evidence in support of the defendants' claim, apart from some general statements, begins in 1639 with a presentment by the jurors of Wormelow in the following terms: "The jurors present upon their oath that all the freeholders under the manor or hundred aforesaid have and ought to have free fishery in the river of Wye aforesaid and Garren on behalf of themselves and the servants of their households from any whatsoever township and parish lying next the said river unless perchance in places exempt where others the subjects of the said lord the King have or ought to have free fisheries in the same rivers either through concession of the said lord the King or any of his progenitors or by prescription. The jurors further present upon their oath that all the freeholders under the manor or hundred aforesaid to whom the fisheries in the aforesaid river of Wye belong, and in whom they are vested, if they have taken any salmon or salmons within the river and have an intention to sell the same salmons that they ought to carry the salmons to the fish table at Whorewithe following the custom of the manor or hundred aforesaid and there to remain for the space of two hours; and they ought to shew the salmon there for the purpose of sale either in whole or in pieces as buyer and seller in company have agreed before carrying the said salmon to any market or fair. And they

(1) [1893] 2 Q. B. 19. (2) (1607) 6 Rep. 59b.

likewise say and present that no person can have the privilege of fishery within the river Wye aforesaid unless he be a free tenant within the manor or hundred aforesaid." It will be observed that the right thus claimed may be exercised by an indefinite number of persons, according as the freeholds in the five parishes are subdivided; and, further, that it is not in any way limited to getting fish for consumption on the property to which the right is appurtenant, but that it expressly contemplates fishing without stint with a view to sale at markets or fairs. There is a perambulation in the same year (1639) by which the five parishes and the river bed from Blackwall's Ditch down to Gorse Acre are shewn to be within "the manor or hundred." In 1764 and 1765 there are presentments of certain persons "for fishing in the free fishery within this manor." In 1815 there is a presentment which is substantially a repetition of the presentment of 1639 above set forth. In 1822 there is a presentment which seems to limit the right to "brinkers," to the exclusion of all other freeholders. "Also they present that the freeholders adjoining the respective rivers Wye and Garren running through this manor or hundred have a right of fishing for themselves and their domestic servants, and that all fish caught in the said rivers and exposed for sale shall be so exposed for two hours (previous to taking the same for sale out of this manor) at a board formerly standing at Hoarwithy, and which should be again placed there." In the nineteenth century there were several proceedings taken against the so-called free fishermen, but I do not propose to refer to them in detail, because the jurisdiction of the magistrates was ousted by the claim of right, and no real decision was arrived at. A careful perusal of the documents, and of the evidence of witnesses at the trial, satisfies me that the alleged right has been exercised openly, notoriously, and continually, sometimes by freeholders alone, sometimes with the assistance of men who were not freeholders, and has been so exercised not for purposes of sport, but for commercial purposes. Large quantities of salmon and other fish have been regularly sold at Hereford, Birmingham, and other places. I do not forget that fishing has sometimes been carried on by men who were only inhabitants and not freeholders, but I do not attach

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Cozens-Hardy M.R.

importance to this circumstance. The claim, therefore, is for a right to fish without stint and for gain as appurtenant to every free tenement in the five parishes, and the great question is whether such a right can lawfully exist. It is argued that a grant ought to be presumed not to all the freehold tenants together, but a separate grant to each tenant with a right to fish without stint in common with all other tenants. In the first place, such a right can scarcely be presumed, unless it was a grant, first, by the lord of the manor of Wormelow; secondly, to tenants of the manor; thirdly, conferring a profit à prendre out of the demesne or waste of the manor. But I think, for the reasons above indicated, that the freeholders in Ballingham, which is one of the five parishes, never were tenants of the manor of Wormelow; and, further, that the bed of the river never was part of the demesne or waste of the manor. In the second place, assuming this difficulty to be got over, I think our law does not allow such a profit à prendre. It is claimed not as a right in gross, but as a profit à prendre in a que estate, or in other words as appurtenant to land. Apart from authorities, the very idea of a que estate seems to involve some relation between the needs of the estate or its owner and the extent of the profit à prendre. A right in an indefinite number of people to take a profit à prendre without stint and for sale must tend to the entire destruction of the property. A prescription to be good must be reasonable in its nature and certain: see Comyns' Digest, "Prescription" E, 3 and 4; and such a prescription would be wholly unreasonable. Our attention was called to many old authorities upon this branch of the law. I do not propose to discuss them in detail, for I think two more modern authorities suffice to establish the principles by which we are bound. In *Clayton* v. *Corby* (1) it was held that a right to dig and carry away from a close so much clay as was at any time required for making bricks at the brick-kiln and at all times of the year could not be claimed by prescription as appurtenant to the brick-kiln and was unreasonable and bad. Lord Denman, in delivering the judgment of the Court of Queen's Bench, said: "It is observable that, in all cases of a

(1) 5 Q. B. 415, 419, 420.

claim of right in alieno solo, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint, and to any number; but such right is measured by the capability of the tenement in question to maintain the cattle during the winter; levancy and couchancy must be averred and proved. Again, in the case of common of estovers, or a liberty of taking wood, called in the books house bote, plough bote, and hay bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use"; and then Lord Denman adds these words: "The like of the common of piscary." "The nature of these rights," Lord Denman says, "is thus compendiously, but we believe accurately, given by Mr. Justice Blackstone (2 Commentaries, p. 35): 'These several species of commons do all originally result from the same necessity as common of pasture; viz. for the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire bote for his fuel; and house bote, plough bote, cart bote, and hedge bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds,' that is, for a certain and definite purpose. In some of these instances, the thing taken is more or less immediately renewable." In *Bailey* v. *Stephens* (1) a claim of a prescriptive right in the owners of close A to enter close B and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon was held void. The judgments are a mine of learning. Erle C.J. pointed out that it was a claim of a right appurtenant to the land of the defendant to take all the profits of the land of the plaintiff wholly unconnected with the defendant's land, and to take that as passing with the land; and, again, that it was a claim to cut down the trees and to sell and dispose of them at pleasure, wholly irrespective of the land of the defendant. He pointed out the vital distinction between a grant in gross to a man and his heirs and a grant to a man and all who may thereafter own a close. Willes J. was very clear in his

(1) 12 C. B. (N.S.) 91.

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Cozens-Hardy M.R.

language (1): "With reference to the first plea, which sets up a prescriptive right, it amounts to this, that, before the time of legal memory, some one made a grant to some one else, whereby the occupiers of the defendant's close for the time being, ad infinitum, were to be entitled to cut all the trees growing in the close of which the plaintiff was in possession at the time the trespass was committed. The simple answer to that, is, that it is not an incident which can be annexed by law to the ownership, much less to the occupation of the land." Byles J. points out that a profit à prendre cannot go to assigns unless it is connected with the enjoyment of the dominant tenement or has some natural connection with it, and he adds (2): "Such a claim of prescription as this is very absurd. That being so, it is unreasonable; and it is laid down that prescriptions must be reasonable. It is not enough to say it is possible to be granted. Even if this could by law be granted, I think it falls within the objection to a prescription, that it is unreasonable, and not only *ought not* to be inferred by a jury, but *cannot* be inferred in point of law, when such a right is claimed." It was sought to distinguish the present case from all former cases on the ground that a common of piscary or a right of fishing differs from all other rights, such as turbary, estovers, and pasture. But there is no foundation in principle for this distinction; and there are many dicta which treat common of piscary as governed by the same rules as other profits à prendre. I am therefore driven to the conclusion that the law of England does not allow such an unlimited commercial right of fishing in alieno solo to pass as appurtenant to land, and that it is not possible to find a legal origin for the right. The result is that the appeal must be allowed, and judgment entered for the plaintiffs substantially in the form claimed in the prayer, but limited to the particular parishes in which the plaintiffs' title has been proved. The defendants must pay the costs of the action and of the appeal.

BUCKLEY L.J. This is an action of trespass upon lands of the plaintiffs, being land covered with water, forming a portion of the river Wye, for entering and taking fish from the water, and

(1) 12 C. B. (N.S.) 110. (2) 12 C. B. (N.S.) 115.

for an injunction to restrain the trespass and the taking of fish. The defendants justify by setting up a right to a free fishery or common of fishery vested in freeholders of the hundred or manor of Wormelow whose freehold is situate in any of the parishes or townships adjoining the river Wye. They have at the Bar, though not, I think, very plainly in the pleadings, set up that the soil of the river at the place in dispute is in the lord of the manor of Wormelow. They say that they, as such freeholders of the hundred or manor, are entitled to the free fishery or common of fishery which they claim.

The first material matter to bear in mind is that the plaintiffs claim not a fishery—an incorporeal hereditament—but a corporeal hereditament, namely, the soil, and of course with it the right to take the profits of the soil, which in this case arise from the taking of the fish in the river. To maintain their action it is not necessary that they should establish any more than a possessory title to the soil. The defendants allege that the soil is vested in the lord of the manor of Wormelow. The lord is not a party to the action, and the question as between the plaintiffs and the lord of the manor cannot be tried in this proceeding; the plaintiffs may succeed even if the soil is in the lord of the manor and not in them. But I shall nevertheless investigate whether upon the present materials the plaintiffs have shewn a prima facie title to the soil (for to do so lends some assistance in dealing with the other part of the case) or whether they have at least shewn a possessory title. This will be the first matter to investigate. The second, assuming that the first is established, is whether the defendants have made out an incorporeal right, namely, the free fishery or common of fishery which they allege.

The plaintiffs are two—namely, (1.) Lord Chesterfield, who is a riparian owner over a long stretch of the river on its right bank, extending from Blackwall's Ditch in the north to a point a short distance below Carey Village to the south, a portion of the river which extends about halfway from Blackwall's Ditch on the north to Goose Acre on the south; and (2.) Mrs. Foster, who is a riparian owner on the left bank of the river from Capler Wood to a point a short distance above Carey Weir. Mrs. Foster's

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Buckley L.J.

property on the left bank of the river is about one-fourth as long as that of Lord Chesterfield on the right bank, and lies about the middle of it, opposite to some part of Ballingham. Lord Chesterfield's property lies partly in Bolston and partly in Ballingham. Mrs. Foster's property lies in Brockhampton. I take Lord Chesterfield's property first.

In Doomsday Book are to be found entries relating to "Irchenfeld," which as described would seem to be a manor, although it is not so called, and to "Wormelow Hundred." A hundred is, of course, an area limited for purposes of jurisdiction, and has nothing to do with property, while a manor is an area over which there are rights of property combined, no doubt, with jurisdiction. In the later documents the Irchenfeld Manor and the Wormelow Hundred become to a large extent confused, Irchenfeld being described as a hundred, and Wormelow as a manor. Upon the character of these two respectively, and upon their boundaries, Doomsday throws but little light. The only point worth adding is that while Doomsday does mention a fishery it has nothing to do with the fishery which is here in question, and that the fishery here in question is not mentioned. In the charter roll of 20 Edward III. is a Crown grant, by which the Crown, in exchange for the manor of Hertfordingbury, granted to Richard Talbot and Elizabeth his wife the land and hundred of Irchenfeld and the manor of Wormelow and the homage and services due for the manor of Wilton and due for the manor of Kilpek (which seem to be sub-manors of the manor of Wormelow), which said manors are stated to be "situate in the land aforesaid," that is in the land and hundred of Irchenfeld. From this I infer that the hundred was an area larger than the area of the manor of Wormelow, and that what is here called the manor of Wormelow formed some part of that hundred. In the 46th Edward III. is an inquisition post mortem on the death of Elizabeth Talbot, wife of Richard Talbot, which finds that she held in her demesne as of fee of the lord the King in chief the hundred of Irchenfeld and the manor of Wormelow, in which same manor there were no buildings nor demesne, which hundred and the manor of Wormelow she held of the lord the King in chief in exchange with the King of the manor of Hertfordingbury. The points

upon this inquisition post mortem are three. In the first place, it finds that the manor of Wormelow was held of the King in chief; secondly, it finds that there were no demesnes of the manor of Wormelow (and the bed of the river would have been demesne); and, thirdly, negatively, it does not find that there was included in the manor that which presumably would have been valuable, namely, the right of fishing in the Wye over such portion of the river, if any, as lay within the manor. I do not stay to refer to some further inquisitions post mortem, beyond mentioning one of the first year of Henry V., which finds that Ankaretta Talbot, on whose death the inquisition was taken, held on the day she died the third part of the manor of Irchenfeld and the hundred of Wormelow (not mentioning any fishery) and certain other properties, including a house in the town of Goderishescastell, which means Goodrich Castle, and certain meadows and the issues and profits of the weirs and fisheries in the water of Wye; that is to say, it refers to Wormelow without mentioning any fishery, and refers to Goodrich Castle with the mention of a fishery. The foregoing ancient documents so far as they go seem to shew, first, that the manor of Wormelow lay within but formed only part of the hundred of Irchenfeld, and, secondly, that there were no demesnes and no fishings forming part of the manor of Wormelow.

Taking up another part of the story, it is plainly made out that there was a manor of Bolston, and a manor of Ballingham. As regards both, there are Crown grants in the 36th Henry VIII. expressed to be grants of the lordship and manor of Bolston and lordship and manor of Ballingham respectively, and both mention fisheries. On October 11, 1571, is a lease (by John Scudamore, who had become entitled to Bolston) of Abytarot mill and fishings mentioning Blackwall's Ditch as the site of the property; and on October 5, 1627, in the court rolls of Bolston, is a presentment of one Sibill Wall as holding Abbettarettes mill with free fishing in the river Wye within the precincts of the manor. As regards Ballingham the documents begin at an earlier date. In the 17th John and 36th Henry III. are extracts from the patent roll and charter roll which lead up to a grant made some time after 1252 by William D'Evreux, the grant being of

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Buckley L.J.

the manor of Ballingham and its fisheries to the priors and monks of St. Guthlac. After the dissolution of the monasteries the Crown grant which I have before mentioned was made in the 36th Henry VIII. Upon the death of John Scudamore on January 29 in the 42nd Elizabeth there is a valor and extent which seems to me very material. It shews that the manor of Ballingham was held of the Queen in chief by a twentieth part of a knight's fee, and that certain other manors, namely, Trerire and Treradowe, were held of Gilbert, Earl of Shrewsbury, as of his hundred of Wormelow. From this it seems plain that Ballingham was not a sub-manor of the manor of Wormelow, but was held in capite, whereas there were other manors, namely, Trerire and Treradowe, which were not held in capite, but held as the valor runs "as of the hundred" (which must mean the manor) "of Wormelow." Nothing could shew more plainly that Ballingham was not part of Wormelow, but was held direct of the Queen as a separate and independent manor. On May 22, 1648, there was a lease for three years granted by William Scudamore of one net fishing in the river of Wye within the manor or lordship of Ballingham and certain other waters rendering so many salmon and so many white fish. On December 20, 1804, there was a lease of Ballingham Hall, and certain other parcels, reserving to the lessor liberty to fish and draw out and land fishing nets from the river Wye upon the banks of the demised premises adjoining the river. From 1861 onwards are a succession of leases granted by Lord Chesterfield or his predecessors in title in respect of this fishery.

From the above it seems to me to be made out (only prima facie, of course, for the lord of the manor of Wormelow is not here) that Lord Chesterfield and his predecessors in title were entitled to certain manors of Bolston and Ballingham which formed no part of the manor of Wormelow, and that they enjoyed and granted leases of the fishings in the Wye appertaining to those manors or to the lands forming part of those manors which abut upon the river.

As against this evidence, the most material documents are a perambulation of June 8, 1639, and a presentation of what is called the Court Leete Customary Court and Court of Survey of

the Manor or Hundred of Wormelow of June 10, 1816. The point of this perambulation and this presentment is that they unquestionably shew the boundary which was being perambulated as crossing from the right to the left bank of the river at Blackwall's Ditch, then continuing down the left bank of the river throughout the whole reach which is here in question, and considerably further down to a point called Goose Acre, and then returning to the right bank. Upon the evidence of these documents the whole reach of the river here in dispute lies within the area, whatever it was, which was the subject of the perambulation. The document of June 8, 1639, is headed "Bounds of Wormelow Manor," and purports to be a survey and perambulation of the manor or hundred, and to be made by certain "men of the tenants of the said manor or hundred." There is, I think, some internal evidence that it is the hundred and not the manor which is the subject of the perambulation. Thus it speaks of going to a mill called Aconbury's Mill "with as much of the demean lands of Aconbury as lie within the hundred of Wormelow." This must mean demesne lands of some other manor lying not within the manor, but within the hundred of Wormelow. It is impossible to reconcile this perambulation with the other documentary evidence if the perambulation is understood to refer to the manor of Wormelow as distinguished from the hundred. Thus, for instance, it includes what I have shewn to be the manor of Ballingham held in capite, which cannot have been part of the manor of Wormelow. I arrive at the conclusion that the boundary here traced is not that of the manor but that of the hundred. If this be so, there remains nothing to shew that the bed of the river as regards the portion in dispute lay within the manor of Wormelow, and that is the conclusion at which I arrive upon the documents.

I may add that if, contrary to my opinion, it were found to be the fact that Bolston and Ballingham were sub-manors of the manor of Wormelow, the true presumption, I think, would be that, as between the manor of Wormelow on the one hand and the manors of Bolston and Ballingham on the other, the soil of the bed of the river abutting upon Bolston and Ballingham would, upon the formation of the sub-manor, pass from the

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Buckley L.J.

head-manor to the sub-manor, and would be waste not of the manor of Wormelow, but of the manor of Bolston or Ballingham, as the case may be.

Upon this part of the case I arrive at the conclusion, so far as Lord Chesterfield is concerned, that he has made out a prima facie title, and a paper title, and a possessory title to the bed of the river usque ad medium filum abutting upon his lands upon the right bank.

As regards Mrs. Foster the evidence is much more meagre. Negatively her deeds do not colour the moiety of the river abutting upon her land as being included in her property. Nothing, to my mind, turns upon this. By the ordinary presumption she would be entitled usque ad medium filum unless the contrary be shewn. Her lands are opposite to some part of Lord Chesterfield's lands in Ballingham. Prima facie Ballingham would be entitled only usque ad medium filum, for, as I have shewn, the perambulation was a perambulation of the hundred, and, therefore, is no indication of the property in the manor. There is nothing, therefore, to displace Mrs. Foster's prima facie title to the moiety of the river abutting upon her land. By a lease of December 12, 1905, A. W. Foster agreed to let a farm (part of these lands), reserving fishing rights. Upon the first question, therefore, which I set out to discuss, I think that the plaintiffs have shewn a sufficient title to enable them to sue.

The next question, then, is whether the defendants have justified by shewing a free fishery or common of fishery vested in the freeholders of the hundred or manor of Wormelow, under which the freehold tenants thereof whose freehold is situate in any parish adjoining the river are entitled to use and enjoy a free fishery or common of fishery. It is desirable at the outset to limit the question which is here to be investigated. First, I have nothing to do with custom. The right is not claimed in the copyhold tenants of the manor. It is a right in the freehold tenants. Secondly, I have nothing to do with any right in gross. Mr. Levett expressly disclaimed any title to a right in gross. The right claimed is by way of prescription in a que estate; that is to say, it is a right claimed as annexed to particular

land, namely, freeholds in Wormelow lying in parishes adjoining the river, exercisable only by those who are seised of that land. Prescription, of course, always presupposes a grant; not that the grant is or can be produced, or that the Court is satisfied that it ever was executed, but because, if a right has been enjoyed from time immemorial, and is a right capable of being legally created, the Court will assume that it has a legal origin.

The right here claimed, so far as it can be traced upon the documents, is to be found indicated first in two pleas of the Crown, both in the 20th year of Edward I., 1292. The first relates to the Foghehope Fishery, now called the Fownhope Fishery, being the fishery in a stretch of the Wye lying largely above Blackwall Ditch, but extending also below Blackwall Ditch, down to Capler Wood or foot of Capler, a distance of about a mile and a quarter, part of the seven miles here in question. It appears by this plea that the hundred of Wormelow and Irchenfeld by its jurors said that Robert de Chaundos had appropriated to himself the fishery of the Wye through his lands at Foghehope, not permitting the men of the lord the King to fish there as they used, but causes them to be attached and amerces them, and which fishery used to be common to all of the same country wishing to fish there. Robert came and claimed the fishery as far as the mid-stream of the water of Wye as appertaining to his manor of Foghehope. It was found that he had not appropriated to himself the fishery, for that his ancestors were in seisin of it as appertaining to the manor of Foghehope. In other words, de Chaundos established his right to the fishery over half of the river so far as Fownhope extended. Further, it is to be noted that the adverse claim was not such as is now put forward. It was a claim of right not in the freehold tenants of the manor of Wormelow whose freeholds lay in parishes adjoining the river, but a claim of a fishery "common to all of the same country." At the same time and before the same justices the fishery of Tregoz was the subject of a like plea, the claim being a claim to a fishery "common to all wishing to fish there." Juliana Tregoz defended the plea: she also succeeded. This fishery was below Goose Acre, and, except historically, has perhaps little to do with

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Buckley L.J.

the present matter; but it does invite the following observation. "The Hundred of Wormelow Irchenfeld" were the complainants. They therefore were claiming rights over some bed of the river which they must have been saying was within the limits of "the hundred of Wormelow," meaning presumably the manor. Juliana Tregoz defended and succeeded on the ground that her lands were adjacent to the river on both sides. She did not, so far as appears, set up that the river was not within the manor. In other words, she succeeded not because the river was not in the manor, but because whether it was within the manor or not she was entitled as riparian owner. In 7 James I. (1609) was a presentment interesting only for this fact, that while it is headed "Wormelow Scilt" it treats Ballingham and Bolston as being separate vills. In 1637 is a presentment upon which the defendants principally rely. It is a presentment that every freeholder of the manor or hundred whose freehold is situate in either or any of the parishes or townships adjoining the river have a right of free fishery in the Wye and Garren for themselves and their domestic servants "for all such freehold as lies within" &c. This is plainly a prescription in a que estate. In June, 1639, is a similar presentment, but with conditions attached to the right of fishing which, shortly stated, are that freeholders who intend to sell salmon must take them to the fish-table at Whorewithe (now called Hoarwithy), following the custom of the manor or hundred, and leave them there for two hours before they take them elsewhere for sale. I may add that there is ample evidence that there was a fish-table at Hoarwithy, and that it fell into decay, and I believe was repaired and replaced from time to time. On May 11 and October 19, 1764, and April 26, 1765, are presentments of the Grand Inquest at the Court Leet of Wormelow Manor of persons for fishing in "the free fishery within this manor," and of fines imposed upon them. On August 29, 1806, was proved the will of one Jane Clarke, who devised the manor of Wormelow to Sir Hungerford Hoskyns. On April 11, 1815, in the Wormelow court rolls is found a presentment of the right of fishing with the obligation to offer for sale at Hoarwithy, and so on, following the language of the last above-mentioned presentment. Sir Hungerford Hoskyns was very active in asserting what he

conceived to be his rights as lord of the manor of Wormelow. At a court of April 26, 1822, a presentment was made that the freeholders adjoining the river had a right to fish. This seems to have been an attempt to limit the right to what have been called "brinkers." During the year 1842 Sir Hungerford Hoskyns, as lord of the manor, was active in trying to prevent fishing by people who he said were not authorized to fish; but in point of fact his intervention came to nothing, and from 1842 to the present time no intervention by the lord of the manor has ever taken place. Meanwhile, as I have stated, the riparian owners were granting leases and dealing with the fishing as if it were their property.

Upon this state of facts I do not stay to dwell upon the difference in the right claimed in the time of Edward I. and in 1637 onwards. The first and most salient observation I make is that that which is claimed is by way of prescription in a que estate to take without stint and for the purpose of sale fish from the waters which I have held to be waters of the plaintiffs.

At this point I emphasize again that the defendants make no claim in gross. It may well be that there can exist in law a right in gross to enter and take without limitation—without stint—the profits or proceeds of another's land commercially for the purposes of sale. But prescription in a que estate, being a prescriptive right in respect of particular land to a profit à prendre in alieno solo, is, I think, necessarily measured by the size or nature or wants of the estate in respect of which the prescription is made. Thus if it be for common of pasture it must be for cattle levant and couchant; that is to say, it must be limited by the number of cattle capable of being supported during the winter upon the estate in respect of which the prescription is made. So if it be for common of turbary this must be limited by the number of chimneys or hearths in which the turf may be burnt. If it be for plough-bote or cart-bote or the like it must be limited by the instruments of tillage, and so on, which have to be repaired. Upon this I may cite from Blackstone, book ii. ch. 3, p. 35, the following: "These several species of commons do all originally result from the same necessity as common of

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Buckley L.J.

pasture; viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his fuel; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds." An argument has been addressed to us that common of piscary stands for this purpose in a different position from other rights of common. It is noticeable that no such distinction is drawn in this passage in Blackstone. *Valentine* v. *Penny* (1) shews that there cannot be prescription in a que estate for a common of turbary without stint. A prescription to dig and sell ad libitum is bad. "The common" (that is, the turf cut) "ought to be spent in the house, and not sold abroad." *Hayward* v. *Cannington* (2) is to the like effect, except that from the report in Levinz it appears that a prescription certain enough in itself, namely, so many turves as two men could dig in a day, was held good. *Cheedley* v. *Mellor* (3) is the like as to common of pasture. *Clayton* v. *Corby* (4) is even stronger. That was not a case of several persons prescribing, but of one person prescribing, as owner of a brick-kiln, for a right to dig and carry away clay for making bricks. Lord Denman's judgment is most instructive. [His Lordship quoted the passage read by the Master of the Rolls, and continued:—] He goes on to quote the passage from Blackstone which I have already cited. The judgments in *Bailey* v. *Stephens* (5) call attention to the difference between grants in gross and prescription in a que estate, and, while affirming that there may be a right in gross to cut and take without stint, hold that there cannot be prescription for such a right in a que estate. Erle C.J. says, as regards the claim there, "It is a claim of the land, not a claim, as this is prescribed, of a right as appurtenant to the estate, and yet wholly unconnected with the estate; a right to take all the growth of a certain kind upon the land. I cannot find any authority for such a claim."

Great reliance, however, was placed in the argument before us

(1) Noy, 145.
(2) 1 Sid. 354; 1 Lev. 231.
(3) 1 Sid. 313.
(4) 5 Q. B. 415.
(5) 12 C. B. (N.S.) 91, 110.

on, and great weight is attached by Neville J. to, *Goodman* v. *Saltash Corporation* (1) as bearing upon this matter. To my mind that case has no application. The matter there in question was not of a profit à prendre in alieno solo, not of prescription in a que estate, but of a right in gross. The presumption was made of an original grant to the corporation subject to a trust in favour of the free inhabitants of ancient tenements in the borough. There is no suggestion or possibility of a suggestion of any such trust in this case. It has been argued that it would be legally possible that the Crown could, at a time before legal memory, have made to the persons here claiming by prescription a grant in such manner as that those persons should have been thereby constituted a corporation for that purpose. It is, I think, quite impossible to presume any such corporation in this case. As stated in *Lord Rivers* v. *Adams* (2), this presumption ought not to be made, not because it is improbable, but because it is inconsistent with the past and existing state of things. There is no trace anywhere of any such corporation having ever existed. On the contrary, so far from there being any meetings of such corporators, or of there being any corporate acts, we find the persons who claim the prescriptive right acting in every way as would have been expected if their claim were as individuals, being holders of freehold tenements within the manor prescribing in a que estate for the right which they allege. Neither by that decision nor by any other of the authorities upon which the respondents relied am I in any way satisfied that the principle laid down by Lord Denman and illustrated by the cases to which I have referred is in any way erroneous. The man who prescribes in a que estate must, I think, prescribe for a profit à prendre limited by the character and wants of the estate in respect of which he prescribes. It is possible that if he claims in gross he may be legally entitled to anything which the owner of the land could grant, including the taking for commercial purposes of the profits of the land; but if he prescribes in a que estate he must prescribe within a measure limited by the estate in respect of which he prescribes.

Lastly, it was argued that a common of fishery and a right to

(1) 7 App. Cas. 633. (2) 3 Ex. D. 361, 366.

C. A. 1908 — CHESTERFIELD (LORD) v. HARRIS. — Buckley L.J.

fish in common with others are separate and distinct things, and that while it may be that the former can legally exist only with stint, yet the latter may be without stint. I fail to follow the suggested difference between a common of fishery and a right to fish in common. And if there be a difference, it seems to me that a right in common claimed by the freeholders of a manor must as between the two things be a common of fishery, and not a right of fishery in common. Upon this I may refer to what James L.J. says in *Robinson* v. *Duleep Singh.* (1) The defendants alternatively claim a free fishery. Whether a free fishery is something capable of being discriminated from a common of fishery is discussed at some length in Coke upon Littleton, 122b. I content myself with saying that in the present case I cannot find any trace of any fishery capable of being asserted other than that which certainly seems to me to be what is generally called a common of fishery.

I rest my judgment upon the proposition which I think is sound in law, that one cannot prescribe in a que estate for a commercial profit à prendre in alieno solo; it must be for a profit à prendre measured by the nature, size, and necessities of the estate. A prescription in a que estate for a profit to be taken without limit, not with reference to the wants of the estate, but commercially for purposes of sale, is unknown to the law. That is the right which the defendants here claim. It is, I think, impossible in law and cannot be maintained. There is no question of their being entitled to something less, namely, to a common of piscary for the purposes of sustenance. They are not freeholders of any ancient messuage.

Under these circumstances I think that their defence of justification fails, and that the plaintiffs are entitled to the relief which they claim, with the costs of the action.

KENNEDY L.J. In this case the first issue raised by the pleadings and by the arguments of counsel is as to the right of either of the plaintiffs to sue. The action is one of trespass, and the defendants challenge the plaintiffs' title to the soil of the river Wye to which, so far as the river line abuts upon their estate, the

(1) 11 Ch. D. 798, 814.

plaintiffs lay claim. I think that the plaintiffs' right has been sufficiently established by the evidence. "Actual possession as owner is presumptive proof of property, and is sufficient against a mere wrong-doer who cannot shew any better title or authority. And it is not open to the defendant to set up a jus tertii to rebut the mere possessory title of the plaintiff, unless he acted under the authority of such right": see Bullen and Leake's Precedents of Pleadings, 3rd ed. p. 417, and cases there referred to. In the present case, upon the grounds of evidence, which have been amply discussed in the judgments of the Master of the Rolls and Buckley L.J., the plaintiffs have established, I think, a title which is sufficient, so far as ownership and possession are concerned, to maintain this action; and the defendants, in so far as they have sought to justify their action under the authority of a right of property in the lord of the manor of Wormelow, have failed to prove that he ever had any such right. There appears to me to be a balance of evidence in favour of the view that there were manors of Ballingham and Bolston held in capite distinct from the manor of Wormelow, and that such manorial rights as exist or ever have existed in regard to the bed of the Wye or to the water flowing above that bed, so far as the stretch of the river at present in dispute extends, are not and never were manorial rights belonging to the manor of Wormelow. The second issue in the case is that raised by the claim asserted by the defendants, even if the plaintiffs are possessed of the soil of the river, that they, as owners of freeholds in the riparian parishes or townships of the hundred or manor of Wormelow, have a free fishery or common of fishery in the water above that soil. They claim the right by prescription, implying the presumption of ancient grant. It is unnecessary, I think, for the purposes of this case, to distinguish between a free fishery and a common of fishery. The defendants do not claim a several fishery, and in regard to their alternative claims in this action we may properly say, as Woolrych (2nd ed. p. 123) says generally, after pointing out the diversity of interpretation to which the expression "free fishery" has given rise in legal discussion, that "to consider the free fishery as the same with common of fishery will be a reasonable as well as a legal conclusion."

C. A.
1908
CHESTERFIELD (LORD) v. HARRIS.
Kennedy L.J.

Now, upon the evidence before us, there is no doubt that for about three centuries freeholders of these five parishes or townships, that is, in the same position as the present defendants, have notoriously and publicly asserted, and have exercised nec per vim nec clam nec precario, the right of fishing which the defendants claim in their defence to this action. I share to the full extent the desire of the Master of the Rolls to support, if it be possible, the case which is thus presented. The question is whether the right which is claimed is one which is recognized by the law. What is the nature and extent of the right? It is claimed not as a right in gross, but as appurtenant, or annexed to, the ownership of a freehold tenement, whether land or house—a profit à prendre by prescription in a que estate. Further, it is a right to take that profit in the soil of another without stint. Each of the possessors of the right (and their number is indefinite) may appropriate out of the waters of the Wye along the stretch in question as many fish as he can catch for the purpose either of consumption or of sale. There is no limitation in reference to the nature or extent of his freehold tenement or the wants of its occupants. Can such a claim be supported in law? I can see no ground in the facts of the present case for presuming an ancient incorporation of the inhabitants of the riparian parishes or townships by the Crown, or a grant of fishery to trustees for the freeholders similar to that which was held by the majority of the House of Lords to be rightly presumed in *Goodman* v. *Saltash Corporation*. (1) Can there be a prescription for a profit à prendre, in the form of a common of fishery in alieno solo, without stint? The general rule of law as to rights of profit à prendre in a que estate seems to be clear. In my opinion it has been correctly stated that no profit to be enjoyed over or taken from land can be made appurtenant to land unless it is accessorial to the enjoyment of the land in relation to which it is claimed. A claim by one landowner to enter upon his neighbour's land and cut down trees and sell them is a claim of a profit à prendre in gross, and cannot be made appurtenant to land, as it is in no wise accessorial to the enjoyment of an estate; but a claim

(1) 7 App. Cas. 633.

to cut down thorns and firewood to burn in the dwelling-house of the claimant is a profit à prendre accessorial to the enjoyment of the dwelling-house and may be made appurtenant thereto, so as to give to mere occupiers thereof for the time being a right to the privileges: Addison on Torts, 8th ed. p. 398, citing *Douglas* v. *Kendall* (1); *Valentine* v. *Penny* (2); *Wilson* v. *Willes* (3); and so in 1863, in *Ellis* v. *Bridgnorth Corporation* (4), Williams J., delivering the judgment of the Court of Common Pleas, said: "The unquestionable rule of law—which was acted on by this Court in *Ackroyd* v. *Smith* (5) and *Bailey* v. *Stephens* (6)—is that no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof." It is laid down by Bracton, De Legibus, ed. 1569, lib. iv., tr. 1, c. 41, fol. 231, in regard to the cutting or lopping of wood "jus secandi vel falcandi in foresta vel bosco alicujus" as appendant to a dwelling-house, that the right must be exercised reasonably according to the size of the wood or waste in which the right is to be exercised and the size of the tenement to which it is annexed, the "quantitas tenementi ad quod debetur illa servitus." The difference between a grant in gross, under which there may be a right to take without stint, and a prescription in a que estate, which does not confer any such right, is pointed out in the judgments of the Court of Common Pleas (Erle C.J., Willes and Byles JJ.) in 1862 in *Bailey* v. *Stephens*. (6) The reason of the rule may, I suppose, be twofold. In the first place, the fact of the appendancy of the right to the tenement points naturally to the maintenance of some relation, in the exercise of the right, between the extent of that exercise and the nature of that tenement and the requirements of its enjoyment. And, in the second place, if the exercise were without stint, it might result in the exercise of his right by one of the commoners becoming the destruction of the rights of the other commoners and, where the right belongs to the grantor in common with the grantees, of the grantor himself also, as for example if all the turf were

(1) Cro. Jac. 256.
(2) Noy, 145.
(3) (1806) 7 East, 121.
(4) (1863) 15 C. B. (N.S.) 52, 78.
(5) (1850) 10 C. B. 164.
(6) 12 C. B. (N.S.) 91.

C. A. 1908

CHESTERFIELD (LORD) v. HARRIS.

Kennedy L.J.

cut and taken away, or all the wood in the servient tenement were cut and taken away.

I have considered whether, where the prescriptive right claimed in a que estate is, as here, a free fishery or common of fishery, the general rule might properly be held not to apply, because a man cannot, from the nature of things, take all the fish out of the river, or tract of river, so as to leave none for others who claim the same right; but after he has on one day taken all he can catch, the next day there may be as many, or even many more, for those who fish in the same water. Neville J., in his judgment in the present case, appears to have held that this difference of subject-matter in the case of a fishery from that which exists in the case of other commonable rights (such, for example, as turbary) might be sufficient to justify the recognition as legal of a prescriptive right to a common of fishery without stint, for he says at page 242 of the report: "It is not a grant of all the fish in the river, if that be open to objection, for it is a grant of all that the grantee can catch, which, as every fisherman knows, is a very different thing." And Woolrych in his work on Waters, 2nd ed. p. 124, appears, if I rightly apprehend his meaning, to contemplate as a possible distinction between a free fishery, or fishery in common, as compared with other similar rights, such as estovers, turbary, &c., that the owner of the free fishery might sell or dispose of his fish as he might think fit. But I conceive that I am not at liberty so to distinguish the right to a profit à prendre in the soil of another, when the right is a right of fishing, prescribed for not in gross but in a que estate, from rights to a profit à prendre in other matters. The law in the cases I have referred to, and elsewhere, has been stated in perfectly general terms; and it is difficult to suppose that, if an exception had existed in regard to the right of fishery from other commonable rights, it would not have been noticed. Blackstone, book ii., ch. 3, p. 35, speaks of common of piscary being given for the sustenance of the tenant's family—that is as originally resulting from the same necessity as common of pasture, common of turbary, fire-bote, house-bote, plough-bote, cart-bote and hedge-bote. And in *Clayton* v. *Corby* (1) Lord

(1) 5 Q. B. 415, 419.

Denman expressly subjects the common of piscary to the same legal limitation as other rights of taking "profit in the soil of another." [His Lordship quoted the passage read by the Master of the Rolls.] Relevant language to the like effect is to be found in the judgment of Willes J. in *Edgar* v. *Special Commissioners for English Fisheries*. (1) The learned judge was there dealing, no doubt, with a claim to a several fishery, and the river was a navigable river, but, so far as regards the applicability of his statement of the law to the present case, these differences of fact appear to me to be immaterial. "Can you show an exclusive right to take all the fish in a navigable tidal river? It has been decided over and over again that a right of that kind must be in some way connected with the enjoyment of the house. . . . . No doubt they might have the use of the fishery for the house, or even for their pleasure, it might be connected with the enjoyment of the house."

It appears to me that it is impossible for us, in the face of the authorities, to hold that the defendants have succeeded in establishing a legal justification for the acts of which the plaintiffs complain as acts of trespass.

I have only one further remark to make in regard to the case put forward by the defendants on this appeal. I am unable to agree that the decision of Wills J. and Wright J. in *Chesterfield* v. *Fountaine* (2), reported in the note to the report of this case and referred to by Neville J. in his judgment, lends any effective assistance to the present defendants as to the legality of such a prescriptive right as they have set up in this action. The nature of that claim—a prescriptive right in a que estate to a profit à prendre without stint in the soil of another—had not been developed in the proceedings in the Divisional Court as it has been in the present action. The importance of the distinction between a right in gross and such a right as the present defendants claim was not submitted to the consideration of the Court. All, as it seems to me, that was there decided was that upon the facts as they were there presented there was at that stage a bona fide dispute; such a degree, at least, of reasonable possibility that the defendant in those proceedings might be able in some way

(1) 23 L. T. 732, 737.
(2) [1908] 1 Ch. 243 n.

C. A. 1908 CHESTERFIELD (LORD) v. HARRIS.

to make out a legal title to do the act complained of as justified the magistrates in refusing to proceed with the charge before them. I agree in the judgment which has been pronounced.

Solicitors: *R. S. Taylor, Son & Humbert, for Gwynne James & Son, Hereford*; *Meredith, Roberts & Mills, for E. L. Wallis, Hereford.*

H. B. H.

C. A. 1908 PARKER J. *May* 8. C. A. *July* 3.

POULTON *v.* ADJUSTABLE COVER AND BOILER BLOCK COMPANY.

[1904 P. 2558.]

Patent—Action for Infringement—Judgment for Patentee—Order for Inquiry as to Damages—Subsequent Revocation of Patent—Estoppel by Judgment.

A patentee brought an action for infringement of the patent. The defendants set up by way of defence that the patent was invalid on the ground of user prior to the grant of the patent. That defence failed, and the plaintiff at the trial obtained judgment for an injunction, and an order for an inquiry as to damages. Pending the inquiry, the defendants, having discovered further instances of prior user, petitioned for revocation of the patent, and obtained an order for its revocation:—

Held (affirming the judgment of Parker J.), that, for the purposes of the inquiry as to damages, the defendants were estopped by the judgment in the action from alleging that the patent was invalid, and therefore the plaintiff was entitled to substantial damages, notwithstanding the revocation of the patent.

APPLICATION to Parker J. to vary the certificate of a Master with regard to damages as after mentioned.

The plaintiff, a patentee, brought an action against the defendants for infringement of his patent, claiming an injunction and damages. The defendants set up by way of defence that the letters patent were invalid on the ground that there had been user of the invention prior to the grant of the patent. That defence, however, failed, and, infringement being admitted, the plaintiff obtained judgment at the trial for an injunction, with an order for an inquiry before a Master as to the amount of damage sustained by the plaintiff through the infringement of the patent by the defendants. Pending the inquiry, the defendants, having discovered further instances of prior user of the

patent of which they were ignorant at the trial, presented a petition for revocation of the letters patent under s. 26 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). Upon that petition they obtained an order for revocation of the letters patent. Upon the inquiry as to damages they set up the order for revocation of the patent as estopping the plaintiff from alleging for the purposes of that inquiry that the patent was valid. The Master gave a certificate stating, in substance, that, as the letters patent had been revoked as invalid, he found that the plaintiff had not sustained any damage, but that, if it was decided that, notwithstanding the revocation, the plaintiff was entitled to damages, he found that the damages amounted to 110*l*. The plaintiff applied to vary the Master's certificate by striking out the finding that the plaintiff had sustained no damage, and inserting a finding that the plaintiff had suffered damage to the extent of 110*l*.

The application was heard before Parker J. on May 8, 1908.

Bousfield, K.C., and *Sebastian*, for the plaintiff.
Walter, K.C., and *J. Hunter Gray*, for the defendants. (1)

PARKER J., after stating the facts substantially as above, proceeded as follows:—This is an application to vary the Master's certificate by striking out the finding that there was no damage and inserting the alternative finding that the plaintiff has suffered damage to the extent of 110*l*. If I had to look at this matter solely with reference to what appears on the face of this certificate and decide it at the present time, I think it would be quite clear that the plaintiff has suffered no damage, because the patent was never valid, and has now been revoked. Therefore the real question turns upon this: Was there any estoppel operating to prevent the defendants on that inquiry as to damages from setting up the fact of revocation as conclusive on the question of damage or no damage; or, in other words, were they bound to allow matters to proceed without

(1) The arguments are sufficiently indicated by the judgment of Parker J., and it has not been thought necessary to report the arguments both in the Court below and in the Court of Appeal.

C. A. 1908 POULTON v. ADJUSTABLE COVER AND BOILER BLOCK COMPANY Parker J.

setting up that order for revocation, so that first the Master and then the Court should give the plaintiff a sum by way of damages on that state of affairs, assuming the validity of the patent, which did not exist? It is really a pure matter of estoppel.

Now I think that on principle it is absolutely clear that a judgment for an injunction and an inquiry as to damages in an action for infringement does estop the defendant from setting up, on the inquiry, the invalidity of the letters patent. So far as the defendant is concerned, he is estopped from denying the validity of the letters patent at the date of the trial, which is the date with reference to which the inquiry as to damages is directed, and, of course, estopped from denying their validity at the date of the infringement in respect of which the inquiry as to damages is directed. Therefore on this inquiry it is perfectly certain that the prior users which were put forward in the petition for revocation could not have been raised. The answer to that suggested by Mr. Walter is, "That is absolutely true; the estoppel would prevent the defendants from doing all that is suggested, but, as soon as the judgment or order for revocation was given, it operated in rem; and, being a judgment in rem, it estopped all the world from denying, not the validity, but the invalidity of the patent, and, therefore, there is an estoppel against an estoppel within the words used by Lord Coke, and, there being an estoppel against an estoppel, the matter is at large." He referred to *Priestman* v. *Thomas* (1) and *Reg.* v. *Hutchings*. (2) I do not think that *Priestman* v. *Thomas* (1) has really any bearing on the case. In that case there had been an action in which were propounded an earlier will and a later will. That action was compromised, and the Court admitted to probate one of the wills. It was subsequently discovered that that will was a forgery, and an action was brought in the Chancery Division to set aside the compromise. In that action the question whether the will was or was not a forgery was a material issue, and it was held that the will was a forgery and the compromise was set aside. Then an action was brought in the Probate Division to revoke the probate

(1) (1884) 9 P. D. 70, 210. (2) (1881) 6 Q. B. D. 300.

of the decision in that case was that the judgment in the Chancery Division operated to estop the parties from denying that the will of which probate had been granted was a forgery. It turned on the consideration of what were the actual facts involved in the actual decision which the Court had given. The judgment of the Chancery Division was merely setting aside an agreement, but, for the purpose of setting aside the agreement, the Court did, and it was material that it should, find that the will was a forgery, and therefore the estoppel extended not only to the matters mentioned in the judgment itself, but to the matters decided for the purpose of that judgment. I do not think any such principle as an estoppel upon an estoppel was suggested at all, either by the counsel in the case or by the learned judge who decided it; and, in order to make it possible that there should have existed in that case any such thing as an estoppel on an estoppel, it would be necessary to conclude that the judgment of the Probate Division in favour of admitting the forged will to probate did raise an estoppel which would prevent anybody who was a party to that action from subsequently taking proceedings for the purpose of revocation. As far as I understand the practice of the Probate Division, the decree whereby a document is admitted to probate is not in its nature irrevocable, but on certain defined grounds proceedings may be taken to revoke it. So that not only is the question of the doctrine of estoppel on an estoppel not referred to in the judgment, but I do not think that it actually arose in the case. In *Reg.* v. *Hutchings* (1) there was an application to justices by a local board under the Public Health Act, 1875, for recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon. This application was dismissed by the justices on the ground that the street was in fact a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, and a stipendiary magistrate made an order for the payment of such

(1) 6 Q. B. D. 300.

C. A. 1908 — POULTON v. ADJUSTABLE COVER AND BOILER BLOCK COMPANY. — Parker J.

expenses. It was held that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond their jurisdiction, which was only to make or refuse an order for the expenses claimed, and that therefore such an adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the stipendiary magistrate might make the order which he made for their payment. That was, as I read it, merely a decision that, though there had been a finding inter partes on the question whether the road in question was a highway repairable by the inhabitants at large, yet, inasmuch as the justices who gave the judgment had no jurisdiction to adjudicate upon that question, no estoppel arose. But in that case the question of the effect of one estoppel as against another appears to have been more or less a matter of discussion, for I find that Lord Selborne is reported to have said this (1): "I am of opinion that there was in law no estoppel; that Sir John Mantell's order was right in substance; and that the present appeal from the order made in the Queen's Bench Division ought to be allowed. I think so, because of the nature of the liability in question, and the nature and limits of the summary jurisdiction which the justices exercised on the 7th of May, 1874." That shews the reason of his decision. Then he goes on: "We have in this case nothing at all to do with any judgment in rem. If we had, there might be ground for holding that there were two cross and contradictory estoppels, one by the judgment for the present defendant in 1874, and the other by the contrary judgment against Cunliffe, the effect of which might have been to set the whole matter at large. But here there is no proceeding in rem, no question of status; and if the case which was quoted to us of *Reg.* v. *Inhabitants of Hartington* (2) was correctly decided (as to which I feel considerable doubt), it is not relevant." The reference there to a judgment against Cunliffe appears to have been to another case in which the justices who had given the first decision as to the road being repairable by the inhabitants at large, apparently on different evidence, had come to a different

(1) 6 Q. B. D. 303. (2) (1855) 4 E. & B. 780, 792.

Selborne is this, that, if there had been a judgment in rem on the case, it might have made a difference, but as a matter of fact all the judgments were judgments inter partes, and there was no question of status. So that it appears to me that that is no real authority as to the effect of an estoppel upon an estoppel, as it is called. It is true that the text-books apparently do suggest that, where that state of affairs does exist, the matter may be at large, and that Lord Selborne does instance the possibility of a judgment in rem having that effect, but, as far as any real decision goes, no such decision has been called to my attention.

The question, therefore, for me to decide is whether or not I can apply that principle of an estoppel upon an estoppel in the present circumstances, so as to avoid having to give the plaintiff in the action a sum by way of damages, when, as a matter of fact, the patent having been ab initio void, he has suffered no damage at all. Notwithstanding the practice that has been laid down in the Court of Appeal in *Shoe Machinery Co.* v. *Cutlan* (1), and the fact that I am of opinion that a decree for revocation of a patent is for some purposes a judgment in rem, I think I am not justified in deciding that I ought to apply a principle for which I can find no authority; and therefore, in my opinion, I am forced to the decision that the original estoppel is a good estoppel, and that the certificate must be varied by stating the finding as to the 110*l.* damages.

F. E.

C. A.

The defendants appealed. The appeal was heard on July 3, 1908.

Walter, K.C., and *J. Hunter Gray*, for the defendants. The grounds upon which revocation of a patent can be obtained under the Patents, Designs, and Trade Marks Act, 1883, s. 26, are the same as those on which the old proceeding by scire facias for the repeal of the patent would have lain. The order of revocation, like the judgment on the scire facias, has the effect of a judgment in rem, which annuls the patent; and in this

(1) (1895) 12 Rep. Pat. Cas. 530.

C. A. 1908 POULTON v. ADJUSTABLE COVER AND BOILER BLOCK COMPANY.

case it proceeded on grounds which go to shew that the letters patent ought never to have been granted, and that the patent was invalid and a nullity from the first. It is submitted that this must affect the amount of the damages for the supposed infringement of the patent. The issues as to the validity of the patent and infringement may possibly have been determined for certain purposes by the judgment given on the trial, but that judgment was not a complete and final judgment in the litigation, as it left the amount of the damages still to be determined. The judgment on the petition for revocation having now conclusively established as against the plaintiff that this patent never was valid, it is submitted that the damages cannot be substantial. The true effect of the order of revocation is to declare that this patent was void ab initio; and the plaintiff is, therefore, estopped from alleging that it was valid for the purposes of the inquiry as to damages. It has been said that an estoppel against an estoppel sets the matter at large: see Notes to the *Duchess of Kingston's Case.* (1)

[VAUGHAN WILLIAMS L.J. Did the defendants really petition for revocation of the patent in the same character as that in which they were sued? They were sued in their individual character; but, in petitioning for revocation of the patent, were they not representing the public?

FLETCHER MOULTON L.J. It is difficult to see how this can be a case of an estoppel against an estoppel. The judgment in the action was a judgment inter partes; the judgment for revocation of the patent is in the nature of a judgment in rem, but does that judgment in rem do more than terminate the patent as from the date of the revocation?]

If the effect of the order of revocation is only to declare the patent void as from the date of that order, it would follow that it would be competent for the plaintiff, after the patent had been revoked, to bring fresh actions for infringements prior to the date of the revocation, but that cannot possibly be so. The effect of an order of revocation must be intended to be the same as that of a judgment for the Crown in the old proceeding by scire facias for a repeal of the patent; and it is impossible to

(1) 2 Sm. L. C., 11th ed. p. 750.

suppose that after such a judgment, which declared the letters patent a nullity, an action could have been maintained for infringement of the patent. It is not contended that, if damages for infringement of a patent had been ascertained and recovered in an action prior to a revocation of the patent, they could have been recovered back again; but here, as regards damages, the litigation is incomplete and has not terminated, no judgment having passed for any definite sum by way of damages at the date of the revocation of the patent. [They cited *Shoe Machinery Co.* v. *Cutlan*. (1)]

Bousfield, K.C., and *Sebastian*, for the plaintiff, were not called upon to argue.

Vaughan Williams L.J. I think that the decision of Parker J. in this case was right.

The plaintiff in an action for infringement of a patent obtained judgment against the defendants, and, as consequential upon that judgment, an order for an inquiry as to the amount of damage which the plaintiff had sustained by reason of the defendants' infringement of his patent. In my opinion the judgment so obtained by the plaintiff made the question whether there had been an infringement by the defendants of a patent then valid, which had been granted to the plaintiff, res judicata as between the parties to the action, and operated as a complete estoppel between them. The defendants' counsel could not deny, when I put it to him, that, if the plaintiff in such a case were to bring a second action with reference to matters which had formed the subject of the first action, because he had not obtained all that he claimed in that action, it would be a complete answer for the defendant to plead that the matter was res judicata in the first action, and that the plaintiff could not maintain the second action, because the questions involved had already been determined in the first action between them. That does not seem to me to be any less the case because an inquiry was directed to ascertain the amount of the damages.

But it is urged for the defendants that, since the matter thus became res judicata, there has been an order for the revocation

(1) 12 Rep. Pat. Cas. 530.

C. A. 1908 — POULTON v. ADJUSTABLE COVER AND BOILER BLOCK COMPANY. — Vaughan Williams L.J.

of the patent. In my judgment it does not matter, in this state of things, what must be deemed to be the real truth with regard to the validity of the patent, either in the past or in the future, or whether the order of revocation must be taken merely to have prevented the patent from continuing in existence, and declared it null and void for the future, or must be taken to have declared it null and void ab initio and, therefore, never to have had any legal existence; for, even assuming that it had the latter effect, I am of opinion that it could not affect the already existing estoppel, by virtue of which the defendants were prevented from denying that which, by the judgment obtained by the plaintiff in the action, had been finally determined to be the truth of the matter as between those parties as regards the questions involved in that action. Assuming, as contended by the defendants' counsel, that, if a fresh action for infringement of letters patent were brought after judgment for the Crown repealing the patent on a scire facias, under the old law, for which the procedure by petition for revocation is a substitute, that judgment could be pleaded in bar of such an action, that law does not appear to me to apply to a case in which the matter of the infringement of a patent had already become res judicata. The question in this case appears to me to be whether the estoppel created as between the plaintiff and the defendants by the judgment in the action remains a binding and effective estoppel, notwithstanding the subsequent revocation of the letters patent, so as to prevent the defendants from reopening, upon the inquiry as to damages, the question of the validity of the patent, which had been decided as between them and the plaintiff in favour of the latter. In my opinion it remains a good estoppel, and there is no estoppel upon an estoppel as suggested. For these reasons I think the appeal should be dismissed.

Fletcher Moulton L.J. I am of the same opinion. In this case a judgment was obtained by the plaintiff against the defendants, by which it became res judicata as between these parties that there had been infringement by the defendants of a patent granted to the plaintiff, which was then valid. As regards the issues of validity and infringement, the cause had then

terminated, but there had to be an inquiry as to the amount of the damages. In point of fact such an inquiry takes time, but, as regards all legal consequences, it may be supposed to take place at the same instant as the determination of the other issues. On that footing the damages would, it is admitted, be substantial. But the defendants urge that, pending the inquiry, a petition for revocation of the letters patent was presented, and an order was thereupon made for their revocation. In my opinion, even on the assumption that the revocation of the letters patent was ordered on grounds which implied that they were in truth invalid from the first, that would make no difference. The order of revocation is in the nature of a judgment in rem which terminates the res, i.e., the letters patent, at the date when the order is made. It has in my opinion no further effect so far as estoppel is concerned. There are many grounds upon which a patent may be revoked, which do not go back to the date of the granting of the letters patent, and in my opinion the effect of the judgment is precisely the same whatever be the grounds on which it is based. As regards the world at large, every one is bound by the fact that the patent ceased to exist at the date of the making of the order of revocation, but the inquiry as to damages in this case must nevertheless proceed on the basis of the judgment already given upon the issues as to the validity of the patent and its infringement by the defendants, a judgment which binds the parties and which is not affected by the subsequent proceedings for revocation of the letters patent. I will point out some of the absurd consequences which would follow from any other view as to the effect of the revocation of the patent than that which I have indicated. Suppose that a patent had been bought for a considerable sum, and, subsequently, perhaps some years after, it had been again sold, and that there was then a petition for the revocation of the letters patent. The last purchaser of the patent, as being the only person then interested in it, would be the respondent. It might well happen that the term of the patent might have so nearly expired that he might not care to defend it. In the case of the old proceeding by scire facias, on lack of an appearance by the defendant, or upon his confession, there was judgment for the Crown, and similarly

C. A. 1908

POULTON v. ADJUSTABLE COVER AND BOILER BLOCK COMPANY.

Fletcher Moulton L.J.

under the present practice, if for some such reason as I have suggested the respondent did not choose to contest the petition, or consented to an order for revocation, there would be an order revoking the patent. Could it then be said that the revocation must relate back to the date of the grant of the letters patent, with the consequence that the sales of the patent had been without valid consideration, and the purchasers could recover back their money, because the subject-matter of the sale was a nullity? I do not think so, and in my opinion the only effect of the revocation is that, so far as the world at large is concerned, the patent must be considered as dead from and after the date of the order of revocation. I agree that this appeal fails and should be dismissed.

BUCKLEY L.J. In this case the plaintiff, a patentee, brought an action against the defendants for infringement of his patent. In that action he succeeded, and obtained an order, the substance of which was that it decided that the patent was valid, and that there must be an inquiry as to the damages sustained by the plaintiff through the wrongful infringement by the defendants of his valid patent. That was, in my opinion, a complete judgment, constituting the matters so decided as between the parties res judicata, and operating as an estoppel upon the defendants as regards those matters for all purposes, except that, of course, the defendants might appeal against it, and that it did not estop them from presenting a petition for the revocation of the patent. The defendants did present such a petition. It is material to observe that they did this, not in the capacity in which they were sued, namely, their private individual capacity, but in a representative capacity, acting as members of the public. They succeeded in obtaining an order for the revocation of the patent. The question then arises whether, in the inquiry as to damages which has been directed, the plaintiff in the action is estopped from denying the invalidity of the patent, which has now been established by the order upon the petition for revocation. I do not feel so clear on this point as my learned brothers, but I can see reasons for answering that question in the same way as they have done, which are as follows. As I have said, the order made

in the action was, in my opinion, a complete judgment inter partes. It contained a subsidiary order, which was made upon the basis that the patent was valid, and directed an inquiry to ascertain what, upon that footing, were the damages sustained by the plaintiff. The effect of this judgment was that the validity of the patent was for the purposes of the inquiry res judicata as between the parties to the action. That being so, the revocation of the patent on a petition subsequently presented cannot affect the estoppel so created, or estop the plaintiff from asserting upon the inquiry as to damages that the patent must be regarded as valid.

Solicitor for plaintiff: *John Bartlett.*
Solicitors for defendants: *Soames, Edwards & Jones.*

E. L.

MANSELL *v.* VALLEY PRINTING COMPANY.

[1906 M. 2340.]

Copyright—Unpublished Picture—Property in Picture—Common Law Right—Infringement—Pirated Copy—Innocent Publication—Damages.

Any person who, however innocently, publishes a pirated copy of an unpublished picture, not registered under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), is liable to damages for infringement of the owner's common law right of property in the picture.

Decision of Swinfen Eady J., [1908] 1 Ch. 567, affirmed.

Appeal from a decision of Swinfen Eady J. (1)

The question raised by this appeal was whether the owner of an unpublished picture could, at common law and apart from statutory protection, recover damages against a person who had, innocently and in good faith, published a pirated copy of the picture.

The facts are given in greater detail in the report of the case in the Court below, but the following summary, taken from the judgment of the Master of the Rolls, is sufficient for the purposes of this report.

(1) [1908] 1 Ch. 567.

C. A. 1908 — MANSELL v. VALLEY PRINTING COMPANY.

The plaintiff was the exclusive owner of two pictures and designs suitable for advertisements which had been produced for him by an artist named Higham, at a cost of 43*l.* Rankine, another artist in the plaintiff's employ, surreptitiously made copies of these pictures, and having left the plaintiff's employ sold them as original drawings to the defendant company. The defendant company published them without notice of the plaintiff's title, and before registration by the plaintiff under the Fine Arts Copyright Act, 1862. On complaint made by the plaintiff the defendant company at once offered to stop any further publication and to hand over all copies, but under the circumstances they declined to pay damages for their innocent publication.

The plaintiff thereupon commenced the present action against the defendant company and Rankine, claiming damages against both defendants and an injunction against Rankine.

Swinfen Eady J. gave judgment for the plaintiff for 43*l.* damages, the cost of the pictures, against both defendants.

The defendant company appealed.

Hon. E. C. Macnaghten, K.C., and *A. B. Shaw*, for the appellants. At common law the innocent infringer cannot be made liable in damages. The appellant company have not converted anything physical belonging to the plaintiff, and throughout have acted innocently. There is no property in the author of a picture of this kind sufficient to support an action at common law. In *Millar* v. *Taylor* (1), relied on against the appellants, the actual MS. was taken, and there was no innocent infringer. In *Mayall* v. *Higbey* (2) unpublished photographs of the plaintiff were actually purchased. Here what was purchased was a copy of an unpublished picture which was sold to the appellants as an original. In *Jefferys* v. *Boosey* (3) the Court was dealing with two distinct things, namely, wrongful abstraction and innocent importation. *Abernethy* v. *Hutchinson* (4) is also distinguishable. No authority can be produced to shew that an action on the case can be brought against an

(1) (1769) 4 Burr. 2303.
(2) (1862) 1 H. & C. 148.
(3) (1854) 4 H. L. C. 815.
(4) (1825) 1 H. & T. 28.

innocent person. The only authority in which an innocent person was sued is *Colburn* v. *Simms*. (1) *Prince Albert* v. *Strange* (2) throws no light on this case; it only shews that the owner of an unpublished picture and the owner of an unpublished literary work are in the same position. Some of the judgments in *Donaldsons* v. *Becket* (3) are in the appellants' favour. An author gets ample protection by registering under the Copyright Acts, and it is not for the Court now to lay down any new principles extending his rights in the case of an unpublished and unregistered picture as against an innocent infringer.

The pictures the appellant company bought from Rankine were in no sense the property of the plaintiff; it was the property of Rankine. That it was Rankine's property appears clearly from the observations of the judges in *Vavasseur* v. *Krupp*. (4) The point was decided in the same way in *Murray* v. *Heath*. (5) The innocent invasion of what, after all, is nothing more than a claim of a right of privacy cannot be made the subject of damages. This right, if it is property at all, more nearly resembles the right of the owner of a trade mark, for which, apart from deceit, no action for damages would lie: *Crawshay* v. *Thompson* (6); *Farina* v. *Silverlock*. (7) [*Tozer* v. *Child* (8) was also cited.]

Micklem, *K.C.*, and *Stuart Bevan*, for the respondent. The plaintiff had a common law right of property in these pictures before publication; this property has been wrongfully converted, and the case is directly within *Hollins* v. *Fowler*. (9) It is clear from *Caird* v. *Sime* (10) and *Donaldsons* v. *Becket* (3) that there is a proprietary right in an unpublished literary production, and the owner of an unpublished picture is in the same position: *Prince Albert* v. *Strange*. (2) In *Jefferys* v. *Boosey* (11) the rights of the author before publication are treated as unquestioned. The nature of this common law right before publication, and the

(1) (1843) 2 Hare, 543.
(2) (1849) 2 De G. & Sm. 652; 1 Mac. & G. 25; 1 H. & T. 1.
(3) (1774) 4 Burr. 2408.
(4) (1878) 9 Ch. D. 351, 355, 357.
(5) (1831) 1 B. & Ad. 804, 811.
(6) (1842) 4 Man. & G. 357.
(7) (1856) 6 D. M. & G. 214.
(8) (1857) 7 E. & B. 377.
(9) (1875) L. R. 7 H. L. 757.
(10) (1887) 12 App. Cas. 326.
(11) 4 H. L. C. 815, 867.

C. A. 1908 — MANSELL v. VALLEY PRINTING COMPANY.

remedy for the violation of that right, were considered in *Millar* v. *Taylor*. (1) It is clear that the common law recognized in an author a property in his composition, so long as he kept it to himself, i.e., property in the abstract thing as distinguished from the concrete thing, the words written upon paper. This is recognized as recently as *Macmillan & Co.* v. *Dent*. (2) The right of property in unpublished works, plays, and letters was considered in *Southey* v. *Sherwood* (3), *Macklin* v. *Richardson* (4), *Gee* v. *Pritchard* (5), and *Turner* v. *Robinson*. (6) These cases therefore shew that the plaintiff has a kind of property, which, if converted, can be sued for and damages recovered. The fact that the appellant company have innocently invaded the plaintiff's rights makes no difference: *Mayall* v. *Higbey*. (7)

Hon. E. C. Macnaghten, K.C., in reply.

Cur. adv. vult.

July 11. COZENS-HARDY M.R., after stating the question now raised for decision and the material facts as given above, continued:—

We have had an interesting argument as to the nature and extent of the common law right of an author before publication. It seems to me that, for the purpose of the present case, there is no uncertainty in the law.

In *Caird* v. *Sime* (8) the right of a professor to restrain the publication of lectures orally delivered in his class-room was established by the House of Lords. Although it was a Scottish case, the law applicable is treated as being the same as in England. Lord Halsbury there said (9): "It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue notwithstanding some kind of communication to others." And Lord Watson said (10): "The author of a lecture on moral philosophy, or of any other original composition,

(1) 4 Burr. 2303.
(2) [1907] 1 Ch. 107, 120, 129.
(3) (1817) 2 Mer. 435.
(4) (1770) Amb. 694.
(5) (1818) 2 Swans. 402.
(6) (1860) 10 Ir. Ch. Rep. 121, 510.
(7) 1 H. & C. 148.
(8) 12 App. Cas. 326.
(9) Ibid. 337.
(10) Ibid. 343.

retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public."

The law thus laid down is based upon property, irrespective of implied contract or breach of duty. It does not depend upon property in the paper or MS. It is an incorporeal property. I do not think it necessary to occupy time by referring to the earlier authorities, including authorities in the House of Lords, which plainly establish the same proposition. I will only remark in passing that in *Caird* v. *Sime* (1) the sheriff substitute ordered all copies of the publications to be delivered up, and that the House of Lords affirmed this order. This is inconsistent with the dicta of Wigram V.-C. in *Colburn* v. *Simms* (2), upon which the appellants relied to some extent, although I doubt whether the Vice-Chancellor's judgment really assists the appellants. *Caird* v. *Sime* (1) was decided in 1887. More than a century earlier a very important case came before the House of Lords: I refer to *Donaldsons* v. *Becket* (3), decided in 1774. It is best reported in Cobbett's Parliamentary History, vol. xvii. pp. 954-1003. The great question there raised was whether an author, after the expiration of the statutory protection given by the statute of Anne, had a perpetual right of literary property at common law, and this question was decided in the negative. The judges were summoned, and several questions were put to them, of which the first was as follows: (1.) Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale and might bring an action against any person who printed, published, and sold the same without his consent. All the judges except three answered this question in the affirmative. This weighty authority, in my opinion, is decisive of the present appeal. It shews that an action on the case would lie against any person who prints and publishes an unpublished book without consent. And when it is established that the right is a proprietary right, it is plain that the element of motive or intention on the part of the defendant is wholly irrelevant.

(1) 12 App. Cas. 326. (2) 2 Hare, 543.
(3) 4 Burr. 2408.

C. A. 1908 MANSELL v. VALLEY PRINTING COMPANY. Cozens-Hardy M.R.

It could not be contended since *Prince Albert* v. *Strange* (1) that the owner of an unpublished picture stands in any different position from the owner of an unpublished literary work. The case of *Turner* v. *Robinson* (2) is, however, a direct authority on the point. The Master of the Rolls there states the law in language which I desire to adopt: "There is no statute for the protection of the copyright in a painting. The only remedies, therefore, which a painter has in case of piracy are—first, an action at the common law; secondly, a suit in equity for an injunction, founded on the common law right; thirdly, a suit in equity, where the piracy has been accompanied by circumstances of fraud, or breach of trust, confidence or contract, express or implied." And again: "By the common law, copyright or protection exists in favour of works of literature, art or science, to this limited extent only, that while they remain unpublished no person can pirate them, but that after publication they are by the common law unprotected."

In my opinion the judgment of Swinfen Eady J., which is based substantially on the reasons I have expressed, was correct, and the appeal must be dismissed with costs.

Farwell L.J. I agree.

Every invasion of a right of property gives a cause of action for damages to the owner against the invader, whether the invasion be intentional or not, and whether it be innocent or malicious. This applies to all rights of property, real or personal, corporeal or incorporeal, the only difference being in the form of action applicable in former days. Thus trespass lay for a direct and immediate injury to the person or the corporeal property of the plaintiff. In trover damages were claimed for interference with the right to possession, or for the wrongful conversion, of specific goods and chattels, while the remedy for injury to incorporeal rights of property was case or trespass on the case.

The real question, therefore, is whether the plaintiff has such a right of property in the two pictures as enables him to recover

(1) 2 De G. & Sm. 652; 1 Mac. & G. 25; 1 H. & T. 1.

(2) 10 Ir. Ch. Rep. 121, 131, 132, 510.

damages against an innocent invader of his rights. It is not suggested that the author's right is not assignable or that it has not been duly assigned to the plaintiff; the only question is what is the extent and nature of an author's right at common law in his own work before publication, apart from any title to the corporeal paper or canvas on which it is written or delineated. I am of opinion that it is an incorporeal right of property giving to the author the fullest rights not only of exclusion, but also of actual enjoyment so far as they are compatible with non-publication. All his rights at common law are limited until and cease upon publication. Before publication he may keep his work unseen or unheard; he may shew or recite it to his friends; he may deliver his lectures to students or allow his MS. play to be acted on special terms, provided always that the use to which he puts it does not amount to publication. Such publication must be by himself or his assigns, and is a question of fact in each case, which may be inferred from acts or conduct such as Lord Cottenham refers to as waiver in *Prince Albert* v. *Strange*.(1) The very question argued in this case appears to me to have been decided not only in *Millar* v. *Taylor* (2), but is also stated to be the law by eight out of eleven judges who advised the House of Lords in *Donaldsons* v. *Becket* (3), where the first question asked and answered in the affirmative is that read by the Master of the Rolls, and the point is brought out by the answer of the dissentients who answer in the negative, "unless such person obtained the copy by fraud or violence." (4) This is borne out by the last reported case in the House of Lords, *Caird* v. *Sime*. (5)

It is contended that this is not so, on the ground that the author's right is a right of property more nearly resembling the right of the owner of a trade mark than any other, and that it has been held that, although an injunction in equity could be obtained to restrain passing-off, no action for damages would lie at common law apart from deceit: *Crawshay* v. *Thompson*.(6) But the right to a trade mark at common law is not a right of

(1) 1 H. & T. 21.
(2) 4 Burr. 2303, 2396.
(3) 4 Burr. 2408.
(4) 4 Burr. 2413.
(5) 12 App. Cas. 326.
(6) 4 Man. & G. 357.

C. A. 1908 MANSELL v. VALLEY PRINTING COMPANY. Farwell L.J.

property properly so-called in the trade mark at all. A trade mark has no independent existence. There is no such thing as a trade mark in gross; it does not exist as property except in conjunction with, and as an accessory to, a business, and then only because it connotes the manufacture or skill of some person or persons. The invasion of a trade mark consists not in taking the actual mark, but in so taking and using it as to injure a business by representing that the goods of the plaintiff are the goods of the defendant. A firm may have acquired a right at common law to use a triangle or a hand as a trade mark denoting their own productions, but they have no right to prevent traders in other distinct trades from using the same marks. The right of an author is to the product of his invention; the right of the trader is to his business, and as accessory thereto to the marks which designate that business, to such an extent as is necessary to protect the business.

I will take another class of cases by way of illustration. Easements and franchises are incorporeal rights of property and any invasion of them is an interference with property giving a cause of action without proof of knowledge or malice in the defendant. But the right to the water in a running stream is not a right of property at all, but is a natural right, and the person who unduly interferes with the flow is treated as a wrong-doer, because running water is visible, and no one can interrupt it without knowing whether he does or does not injure those above or below him: see Lord Cranworth in *Chasemore* v. *Richards*. (1) If, however, the water runs in an unknown channel underground he is not liable, because the right is not one of property, but depends on knowledge and arises ex æquo et bono, as I have tried to explain in *Bradford Corporation* v. *Ferrand*. (2)

It is said that it is hard on the defendant company, but it is no greater hardship on them than on any other innocent person who buys a stolen article in good faith but not in market overt, and it is at least as hard on the plaintiff to lose his property, if it is (as in my opinion it is) in every sense of the word his property.

The defendant company consented to give up the copies of the

(1) (1859) 7 H. L. C. 349, 379. (2) [1902] 2 Ch. 655.

pictures, and this should not form any part of the judgment except by consent. I am not prepared without further argument to assent to the proposition that the plaintiff could demand the copies without any payment at all, but express no opinion either way.

KENNEDY L.J. I have had an opportunity of reading and considering the judgments prepared in this case by the Master of the Rolls and Farwell L.J., and I entirely concur in the reasoning and the conclusions of those judgments.

It appears to me that the decision of this case depends upon the application of two propositions of law: (1.) that the plaintiff had at common law a property in the artistic designs which Rankine pirated and transferred to the defendants; (2.) that according to the law of this country, except in special circumstances, which are not present in this case, a person gains no title which justifies him in dealing with the property of another by the acquisition of that property, however innocently, from one who himself has no title to it, but has unlawfully got possession.

In my opinion it is clear that the plaintiff had until publication—and here there had been no publication—a property at common law in these artistic designs, and Rankine, who unlawfully possessed himself of them, could confer upon the defendants, to whom he sold them, no legal right to deal with the plaintiff's property. In dealing with them, therefore, the defendants, although they had neither knowledge of Rankine's wrong-doing nor any intention to do any wrongful act themselves, were guilty of a tort for which they became liable to the plaintiff in damages, and the judgment pronounced by Swinfen Eady J. was perfectly right.

Solicitors: *Sole, Turner & Knight; James, Mellor & Coleman.*

W. C. D.

SWINFEN EADY J.

In re BRITISH BUILDING STONE COMPANY, LIMITED.

1908

[0092 of 1908.]

July 7.

Company—Winding-up—Sale of Undertaking—Dissentient Member—Purchase of Interest—Arbitration—Right of dissentient Member to examine Officers prior to Arbitration—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 115, 161, 162.

Where the undertaking of a company in voluntary liquidation is being sold to another company under s. 161 of the Companies Act, 1862, and the liquidator has elected to purchase the interest of a dissentient member at a price to be determined by arbitration under s. 162, the Court will not give that dissentient member liberty to examine the officers of the company under s. 115 with the view of obtaining evidence to enhance the value of his interest in the arbitration.

Morgan's Case, (1884) 28 Ch. D. 620, applied.

MOTION.

The British Building Stone Company, Limited (hereinafter called the British Company), was incorporated on October 17, 1906, with a capital of 100,000*l.*, divided into 100,000 1*l.* shares, partly preferred ordinary and partly ordinary shares. It was empowered by its memorandum of association to sell its undertaking for shares of any company purchasing the same.

In January, 1908, it became advisable that the British Company should be amalgamated with the Lithographic Stone and Marble Company, Limited (hereinafter called the Lithographic Company), whose capital was also divided into 1*l.* shares. It was arranged that the Lithographic Company, which was empowered by its memorandum of association to purchase the business of similar companies, should take over the property and assets of the British Company and should give the shareholders of the British Company one fully-paid 1*l.* share in the Lithographic Company for every share of a similar amount and similar class held by the shareholders in the British Company. This arrangement was carried out by an agreement of February 6, 1908, entered into between the two companies, subject to confirmation by the respective companies in general meeting.

On February 7, 1908, a special resolution approving and adopting the agreement was passed by the British Company. A shareholder, Sharpe, holding 1000 preferred ordinary shares, voted against the resolution.

On March 5, 1908, the resolution was confirmed, Sharpe not being present.

On the same day a special resolution was passed for the voluntary winding up of the British Company and the appointment of Ford as liquidator, Sharpe not being present.

On March 27, 1908, this resolution was confirmed, Sharpe being present but not voting.

On March 11, 1908, Sharpe gave the liquidator formal notice in writing under s. 161 of the Companies Act, 1862, that he dissented from the special resolutions passed and confirmed on February 7, 1908, and March 5, 1908, and requiring the liquidator either to abstain from carrying those resolutions into effect or to purchase Sharpe's interest in the British Company at a price to be determined in accordance with s. 162.

On June 23, 1908, after some intermediate correspondence, the liquidator, through his solicitor, served formal notice accepting Sharpe's notice and stating that as liquidator he preferred to purchase Sharpe's interest as a dissentient shareholder at a price to be settled by arbitration and determined in manner provided by s. 162 of the Companies Act, 1862.

Accompanying this notice was a letter from the liquidator's solicitor, stating that if both parties could concur in the appointment of a single arbitrator such a course would be desirable, and enclosing the names of five firms of chartered accountants of high repute suggested by the liquidator, and asking whether Sharpe would agree to the appointment of a member of any one of those firms as arbitrator, or would submit some other names to the liquidator.

On June 23, 1908, Sharpe's solicitors replied that in view of the proceedings taking place with regard to the company it was obvious that for the moment they could not proceed in the matter.

In the meantime, namely, on March 30, 1908, Sharpe, as a contributory, had issued a summons under s. 138 of the Companies

SWINFEN EADY J.

1908

BRITISH BUILDING STONE COMPANY, LIMITED, *In re.*

Act, 1862, against the liquidator for an order that for the purpose of determining under s. 10 of the Companies (Winding-up) Act, 1890, whether any person who had taken part in the formation or promotion of the British company, or any past or present director, manager, liquidator, or other officer thereof, had misapplied or retained or become liable or accountable for any moneys of the said company, or been guilty of any misfeasance or breach of trust in relation to the said company, the applicant might be at liberty to examine under s. 115 of the Companies Act, 1862, any person or persons, and in particular certain named persons, including the liquidator and certain directors of the British Company, the late secretary of the Lithographic Company and a late director thereof, before an examiner of the High Court.

On May 29, 1908, the registrar made an order directing the liquidator and other named persons to attend to be examined on the part of the said Sharpe under the provisions of s. 115, and that summonses for the purpose of such examination should issue accordingly.

Summonses were accordingly issued on June 12, 1908, directing the witnesses to attend to be examined on July 2, 1908. At the examination some of the witnesses objected to being examined by Sharpe, on the ground that, as he had given notice under s. 161 as a dissentient member, he had no locus standi and had no right to institute proceedings under s. 10 of the Act of 1890. The registrar thereupon adjourned the hearing to enable these witnesses to take out a summons to discharge the order of May 29, 1908.

The summons was issued on the same day and by consent set down for hearing on the following day, when it was at once adjourned into Court. It was entered in the list and treated as a motion.

Stewart-Smith, K.C., and *Harney*, for the applicants. The object of the examination is to obtain evidence to enhance the value of Sharpe's interest in the arbitration. This is not a proper use of s. 115. The order of May 29, 1908, should therefore be discharged. In a somewhat similar case a dissentient

member was refused an order for inspection of the company's books under s. 156 : see *Morgan's Case.* (1)

Gore-Browne, K.C., and *Thorn Drury*, for Sharpe. Sharpe, though a dissentient member, is still a member of the company until he is paid off. He may in fact be unable to obtain payment. While he remains a member he has the same interest as a non-dissentient member in recovering assets for the company. Now the arbitrator can only value the tangible assets. He cannot decide any question of misfeasance against the directors, or take into account any assets that may possibly be recovered from them. It is important, therefore, that the examination and any subsequent proceedings should take place before the arbitration, in order that the real value of all the assets may be properly ascertained. Otherwise Sharpe's interest may be under-valued.

Again, the examination may shew that there are grounds for a compulsory order, and that the sale ought not to take place at all.

[SWINFEN EADY J. An examination under s. 115 to see if there are grounds for a compulsory order is quite unprecedented. It looks as if Sharpe is indirectly trying to prevent the liquidator exercising his option under s. 161.]

That is not the intention. He merely wishes to have the true value of the assets placed before the arbitrator, so that his interest may be properly ascertained.

Pepys, for the liquidator.

SWINFEN EADY J. In this case a special resolution has been passed and confirmed sanctioning the sale of the property of the British Company to the Lithographic Company. The British Company is in the course of being wound up voluntarily. Sharpe, having given notice of dissent under s. 161 of the Companies Act, 1862, was entitled under that section to require the liquidator to do one of the following things as the liquidator might prefer—that is to say, either to abstain from carrying the resolution into effect, or to purchase Sharpe's interest at a price to be determined by arbitration.

The option under s. 161 is given to the liquidator, not to the

(1) 28 Ch. D. 620.

SWINFEN EADY J.

1908

BRITISH BUILDING STONE COMPANY, LIMITED, *In re.*

shareholder. The liquidator has exercised the option, he has determined to purchase Sharpe's interest, and has suggested the names of various persons suitable as arbitrators and is willing to go to arbitration. Sharpe asks that he may be at liberty to examine certain persons under s. 115 with the view of obtaining evidence to enhance the value of his shares in the arbitration.

In my opinion s. 115 ought not to be used for that purpose. Sharpe's proper remedy is to have his interest ascertained under s. 162. When the value of his interest has been ascertained and paid he will not have any further interest. It is suggested, though not on any definite ground, that he may be unable to obtain payment. I am not satisfied that there is any reasonable ground for apprehension on that point, but with the view of keeping the point open I propose to direct the motion to stand over till after the arbitration and award, postponing the examination until then.

At present I am satisfied that, having regard to Sharpe's position as a dissentient member entitled to be paid the value of his interest, and that only, no examination of officers ought to be ordered to supply evidence for use on the arbitration.

In *Morgan's Case* (1) a dissentient member claimed the right to examine the books of the company under s. 156 in order to see whether it would be better for her to accept the offer of 5*s.* in the pound for her holding in the old company or to go on with the arbitration. The application was refused.

It is suggested that the examination may shew that there are grounds for a compulsory order, and that the resolution for sale ought not to be carried into effect. It is open to Sharpe to present a petition for a compulsory order, but he is not entitled to obtain for himself by indirect means the option which the statute expressly gives to the liquidator, namely, the option of deciding whether the sale shall not be carried out, or whether Sharpe's interest shall be purchased.

The motion and examination will stand over till after the arbitration and award. Liberty to apply.

Solicitors: *H. B Simeon; Townsend & Sharpe; W. J. Pitman.*

(1) 28 Ch. D. 620.

G. R. A.

GREAT WESTERN RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY.

WARRINGTON J.

1908

May 23, 25, 26.

[1908 G. 275.]

Railway Company — Compulsory Powers — Powers exercisable for limited Period—Expiration of Time allowed—Company in lawful Possession of Land—Power to construct Railway thereon—Ultra Vires.

In an Act of Parliament authorizing a company to construct a railway a section which provides that if the railway be not completed within five years from the passing of the Act, then, on the expiration of that period, the powers by the Act given to the company for making and completing the railway are to cease, only applies to powers which the company could not exercise except by virtue of the Act. If the company have, before the expiration of the five years, lawfully acquired the right to use the land, and if they are incorporated for the purpose of making the railway, they can make it under their common law powers notwithstanding the expiration of the five years.

Tiverton and North Devon Ry. Co. v. *Loosemore*, (1884) 9 App. Cas. 480, explained and followed.

Action for a declaration that the plaintiff company were entitled to exercise running powers over the Bristol and Gloucester line of the defendant company and over any part thereof, and for that purpose to run on and off the said line by means of junctions at Yate, Standish, and Berkeley Road, and that their running powers and rights through these junctions were not confined to traffic to and from the Berkeley Road Junction Railway, or to traffic in connection with the Severn and Wye and Severn Bridge Railway, but extended to all the plaintiffs' traffic; and the statement of claim also asked that the junctions should be completed. The main question turned upon the true construction of an agreement made between the parties in 1896 and of the Great Western Railway (South Wales and Bristol Direct Railway) Act, 1896, whereby, inter alia, the Great Western Railway Company were to construct these junctions between their line and that of the defendant company, and the latter were to grant them an easement for that purpose. On February 4, 1898, the defendant company, in consideration of

WARRINGTON J.
1908
GREAT WESTERN RAILWAY v. MIDLAND RAILWAY.

300*l.*, granted to the plaintiff company a licence to enter upon their land and construct and use the junctions, subject nevertheless to the provisions of the Act of 1896. Sect. 21 of the Act was as follows: "If the railways be not completed within five years from the passing of this Act then on the expiration of that period the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto shall cease except as to so much thereof as is then completed." The plaintiff company constructed the junction railways, but had not actually connected them with the defendant company's line, and it was now suggested that as their powers had expired in 1901 they could not complete the junctions.

Cripps, K.C., *Rowden, K.C.*, and *Howard Wright*, for the plaintiffs, argued the question of construction.

Upjohn, K.C., and *Sargant*, for the Midland Railway Company, after referring to the general question. The plaintiffs claim the right to complete the junctions with our line, but their only power to construct them is under the private Act of 1896, and all those powers ceased in 1901 by virtue of s. 21. The construction of those junctions would be ultra vires the plaintiffs and therefore unlawful. Spending their money on objects which they have no right to carry out is unlawful, and these junctions are not incidental to their undertaking. It is no answer to say that they have acquired from us an easement which entitles them to go on our land, for that easement was granted subject to the provisions of the Act, and the Act says that the works must be completed within five years. The proposed work is therefore ultra vires, and we cannot by waiving our objection, although we are willing to do so if the running powers are limited as we suggest, give the plaintiffs power to construct the junctions. Therefore their only right to come on our land is by a title which has expired, and they are trespassers.

[WARRINGTON J. You ought not to raise this point after the correspondence which took place in 1903. You allowed them to trespass.]

At that date there was no suggestion that these junctions would

be used in the way that is now proposed. We have no power to sanction the construction of the junctions: *Great Northern Ry. Co.* v. *East and West India Docks and Birmingham Junction Ry. Co.* (1)

Rowden, K.C., in reply. The defendants are not entitled to raise the point of trespass, and they cannot set up that they are private persons who have been injured. We are not trespassers, and we have power to complete the junctions. We are on the land by virtue of the easement which we have purchased, and the mere carrying out of the purposes for which the easement was granted is not within s. 21 of the Act of 1896. The work we propose to do will be done on our own land under our ordinary common law powers as owners. No doubt the easement could only be granted subject to the provisions of the Act; but the point is that our ordinary powers as owners of land do not come to an end under s. 21. The only powers affected by provisions such as s. 21 are statutory powers, such as powers to divert streams and roads, which we shall not have to make use of in making the junctions: *Tiverton and North Devon Ry. Co.* v. *Loosemore* (2); *Webb* v. *Direct London and Portsmouth Ry. Co.* (3)

Upjohn, K.C., replied on the cases.

WARRINGTON J. held that the defendants were right on the main question, and that upon the true construction of the agreement and Act of Parliament of 1896 the running powers through the junctions were confined to traffic to and from the Berkeley Road Junction Railway and to traffic in connection with the Severn and Wye and Severn Bridge Railway. His Lordship went on to say:—There is another point taken by the Midland Railway Company which in strictness it is unnecessary for me to decide, but as it has been argued at length I think it better to express my view upon it. The point shortly stated is this: By s. 21 of the Act of 1896, by which these junction lines were to be constructed, it was provided that: "If the railways be not completed within five years from the passing of this Act

(1) (1852) 7 Rail. C. 356. (2) 9 App. Cas. 480.
(3) (1851) 9 Hare, 129, 140.

WARRINGTON J.
1908
GREAT WESTERN RAILWAY v. MIDLAND RAILWAY.

then on the expiration of that period the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto shall cease except as to so much thereof as is then completed." The junction railways had, before the commencement of this action, been completed up to the point at which they were to enter the land of the Midland Railway Company. Prior to the expiration of the five years the Great Western Railway Company had acquired from the Midland Railway Company the necessary grant of the right to use their land for the purpose of constructing the actual junctions, but the Great Western Railway Company had not actually constructed them. In one case they were 242 yards from the point of junction, and in the other case they were 110 feet from it; but I have come to the conclusion that, as between the two companies, there was an arrangement (I think the correspondence shews it quite plainly) that, as the Great Western Railway Company did not want immediately to use the junctions, they were not to call upon the Midland Railway Company to cause the actual junctions to be made; and that their stopping short at the point where they did was in consequence of the arrangement made between them. However, that may or may not be so. But the Midland Railway Company now say that, in strictness, though they are willing to concede their right to make these junctions if they are to be used only for the purpose for which I think they alone can be used, the completion of these junctions is now ultra vires, and the Great Western Railway Company are debarred by s. 21 from completing these railways and so making effectual junctions with the Midland Railway. Now, is that contention well founded? Is it really ultra vires of the Great Western Railway Company, having regard to s. 21, to construct these pieces of line? That turns on the true construction of s. 21. I have been referred, as authority for the construction contended for by the Great Western Railway Company, to *Tiverton and North Devon Ry. Co.* v. *Loosemore* (1), and the contention of the Great Western Railway Company is this: They say that, as within the five years they acquired from the Midland Railway Company the right to construct the line, it matters not that the five years

(1) 9 App. Cas. 480.

have now expired; that they can, independently of the Act of Parliament, construct the line, and that they are not deprived of the right of doing so by s. 21. Several speeches made by the learned Lords in that case have been read and commented upon, and in particular the speeches of Lord Bramwell, Lord Blackburn, and Lord FitzGerald. Those speeches, in my opinion, when they are carefully considered, all agree in this, that the right to make a line of railway on land belonging to a railway company is not a right granted by the Act of Parliament, and is not a right affected by a section corresponding with s. 21; that if the railway company have lawfully become the owners of the land, then, by their common law rights as owners, if they are incorporated for the purpose of making the railway, they can make that railway. I think it also follows from those judgments, and especially the judgment of Lord Blackburn, that the real meaning of sections corresponding with s. 21 is not that the power to make the railway ceases. The section provides that on the expiration of the period "the powers by this Act granted to the company for making and completing the railways" shall cease. What is meant by that is that powers which they could not exercise for making and completing the railway except by virtue of the statute are to cease; for example, powers to interfere with roads and watercourses, and powers to interfere with other rights of neighbouring owners without acquiring their land. Those powers will cease, but if, without the necessity of resorting to those powers, they can by virtue of their right of ownership construct the railway, then s. 21 does not interfere with them. Although it may not have been necessary for the decision in *Tiverton and North Devon Ry. Co.* v. *Loosemore* (1), I think that is the true result of all the judgments of the learned Lords who addressed the House in that case. I think also that that was the view of Lord Selborne in the Court of Appeal (2) as expressed by some of the interlocutory observations which he made in the course of the argument in that case. It seems to me, therefore, that I am justified, if it were necessary to decide the point, in coming to the conclusion that that is the true construction of s. 21, and that, therefore, the point which the

(1) 9 App. Cas. 480. (2) (1882) 22 Ch. D. 25, 49.

WARRINGTON J.
1908
GREAT WESTERN RAILWAY v. MIDLAND RAILWAY.

Midland Railway Company have made as to the construction of the railway being ultra vires is a bad point. As I have said, I am quite conscious that it is not necessary, having regard to the construction which I have put upon the agreement and the Act of Parliament, to decide this question, because the Midland Railway Company state that they are willing to concede the right to construct the railways if the agreement has that limited construction, but I have thought it right to give judgment on the point. The result is that what the Midland Railway Company are willing to concede is not a concession at all, but a right of the Great Western Railway Company; and the result of the whole case is that, instead of the declaration asked for by the plaintiffs, there ought to be a corresponding negative declaration, and that the plaintiffs must pay the costs of the action.

Solicitors: *R. R. Nelson; Beale & Co.*

H. C. R.

NEVILLE J.
1908
May 27, 28, 29; *June* 1, 4.

LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED *v.* MERSEY TRADING COMPANY, LIMITED.

[1907 L. 1602.]

Pier—Unauthorized Construction—Public Nuisance—Rates for Passengers—Rates for Vessels "mooring"—Recovery of Rates paid under Protest—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict.* c. 27), *ss.* 2, 25, 33, 47—*General Pier and Harbour Act*, 1862 (25 & 26 *Vict.* c. 19), *ss.* 6, 13, 17, 19—*Grant of Foreshore by the Crown—Crown Lands Act*, 1829 (10 *Geo.* 4, *c.* 50), *s.* 73—*Crown Lands Act*, 1866 (29 & 30 *Vict.* c. 62), *s.* 20.

A provisional order of the Board of Trade, confirmed by a special Act of Parliament, authorized a company to construct a pier, and provided that, when a certificate of the due construction of the pier had been given by the Board of Trade, the company might levy certain rates on passengers using the pier and on vessels "mooring" within the limits defined by the order. In 1900 H., who had acquired the pier from the assigns of the liquidator of the company, discovered that the pier had not been constructed in accordance with the provisional order and that the certificate of the Board of Trade had not been given, and thereupon, with the view of perfecting his title, he obtained from the Crown, under the powers of the Crown Lands Act, 1829, a grant of the foreshore and

bed of the sea on which the pier stood. In 1907 the plaintiffs ran passenger steamers to the pier, and the M. company, to whom H. had leased the pier, refused to allow the plaintiffs' steamers to come alongside the pier except on payment of a certain lump sum for the season for passenger rates and also "mooring" rates. In an action by the plaintiffs for an injunction to restrain the M. company and H. from excluding them and their passengers from using the pier, and for repayment of rates paid under protest, on the ground that the defendants were not the lawful owners of the pier and that the rates had been illegally demanded:—

Held, that the pier, being an unauthorized structure, was an obstruction to navigation and a public nuisance, and consequently no statutory rights arose in favour of either the defendants or the public.

Held, also, that the plaintiffs, as individual members of the public, could not elect whether they would treat the pier as a nuisance or adopt it as an authorized undertaking.

Held, also, that as the pier was the property of the defendants they could exclude the plaintiffs from it although it was a nuisance: *Dimes* v. *Petley*, (1850) 15 Q. B. 276.

Held, also, that the plaintiffs could not recover rates they had paid under protest because they had received the consideration for such payment.

Held, also, that vessels coming alongside and making fast to the pier merely to land and embark passengers were not "mooring" within the meaning of the provisional order.

Quære, whether the grant by the Crown to H. of the foreshore and bed of the river was valid.

In 1892 the Colwyn Bay Pier Company, Limited, obtained a provisional order of the Board of Trade, made under the provisions of the General Pier and Harbour Act, 1861, and confirmed by a special Act of Parliament, which authorized them to construct a pier at Colwyn Bay, North Wales. The order was common form, and, so far as material, was as follows: "1. The Colwyn Bay Pier Company, Limited (in this order called the company) shall be the undertakers of the works authorised by this order, and shall have and may exercise the powers, privileges, and authorities conferred by this order, and may carry this order in all respects into effect. . . . . 3. For the purposes of the works authorised by this order the company may from time to time, by agreement, enter upon, take, and use such of the lands shown on the plan deposited for the purposes of this order, as they think requisite. . . . . 5. The limits within which the company shall have authority, and which shall be deemed the limits to which the provisions of this order, and the power to levy rates

NEVILLE J. 1908 LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

extend, shall comprise the pier and works authorised by this order, and an area below high-water mark within 100 yards from any part of the pier or works. 6. Subject to the provisions of this order, and subject also to such alterations (if any) in the deposited plan and section as the Board of Trade require from time to time before the completion of the works, in order to prevent injury to navigation, the company may on the lands and in the lines and according to the levels shown on the deposited plan and section (so far as the same are shown thereon), and within the limits of deviation shown on the plan make and maintain the pier and works authorised by this order, with all necessary works, accesses, and conveniences." 7. The works authorized by the order were described as a pier, jetty, and landing-place commencing at the northern fence of premises called Rhôs Fynach, and extending thence seawards in a north-easterly direction for a distance of 500 yards, or thereabouts, and there terminating . . . . and were to be situate in the parish of Llandrillo-yn-Rhôs, in the county of Denbigh, or on the foreshore or in the sea and bed thereof, adjacent thereto. The pier to be solid for a distance of ten yards, or thereabouts, from its commencement, and to be constructed as an open work for the rest of its length. "11. The company in constructing the pier and works may, with the consent in writing of the Board of Trade, alter and deviate the same laterally from the lines of such works delineated on the deposited plan to any extent not exceeding the limits of deviation marked on that plan, and may with the like consent deviate vertically from the levels shown on the deposited section to any extent. . . . . 13. When a certificate has been obtained from the Board of Trade that all consents and approvals on the part of the Board of Trade required under this order, or otherwise necessary to the due construction of the works authorised by this order, have been given, the company may, subject and according to the provisions of this order, demand, receive, and recover for the use of the pier and other works, and in respect of the persons, matters, and things described in the schedule to this order, any sums not exceeding the rates specified in that schedule." Sect. 14 empowered the company on the certificate of the Board of Trade, and notwithstanding s. 25 of the Harbours,

Docks, and Piers Clauses Act, 1847, to levy rates, although the whole of the works were not completed. Sect. 16 empowered the company to grant exemptions from and to enter into compositions with respect to rates, but so that no preference was given in any case to any person. Sect. 19 empowered the company, with the written consent of the Board of Trade, to sell or lease their undertaking, and provided that the lessee or purchaser might exercise all or any of the powers conferred upon the company by the order (including powers of levying and receiving tolls, rates, and dues) as the company might have or exercise under the Harbours, Docks, and Piers Clauses Act, 1847, or the order. "28. The company may on any special occasions, but not exceeding twelve days in any one year, close the pier against the public, and may, if they think fit on such occasions, admit any persons to the pier on payment of such special rates of admission not exceeding 1*s.* for each person. . . . . Provided that on all such occasions the company shall reserve a sufficient passage along the pier, from the landing steps to the shore, for any persons landing or embarking at the pier, such reserved passage to be open for use by such persons at the ordinary charge, and without payment of any special rates, so long only as they use the pier as a passage, and do not remain upon it. . . . . 30. The company may from time to time borrow and reborrow on mortgage at interest on the security of the tolls, rates, duties, and revenue received under this order, such money as may be required for the purposes of this order, not exceeding in the whole the sum of 8000*l.*, and the company shall not under any authority other than this order borrow or reborrow money on the said security." Sect. 32 directed that payment of arrears of principal and interest under any mortgage might be enforced by appointment of a receiver. "36. Within the limits of this order the company shall be a local authority within the meaning of the Merchant Shipping Act, 1854, and Acts amending the same, and shall have all the powers and privileges conferred by those Acts on local authorities. 37. No vessel or boat shall break bulk within the limits of this order without the consent of the company or their piermaster. 38. No vessel or boat shall be moored or anchor alongside or within 100 yards measured in any direction from any part of the

NEVILLE J. 1908 — LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

pier without the consent of the company or their piermaster. . . . . 43. (1.) If within two years from the date of the passing of the Act confirming this order the works authorised by this order should not be substantially commenced, the powers by this order given for executing such works, or otherwise in relation thereto, shall cease unless the time for commencement be extended by the special direction of the Board of Trade. (2.) If the works authorised by this order, after having been substantially commenced, should be virtually suspended for twelve consecutive calendar months, the powers by this order given for executing such works, or otherwise in relation thereto, shall cease, except as to so much of such works as shall be then completed, unless such powers shall, by the special direction of the Board of Trade, be continued and directed to remain in force for any period not exceeding five years from the date of the Act confirming this order. . . . . 45. This order shall not be taken as a consent to the surrender of any rights, interests, powers, authorities, or privileges transferred to the management of the Board of Trade by the Crown Lands Act, 1866, nor shall any works under this order be commenced within limits affected by any such rights, interests, powers, authorities, or privileges, without the assent of the Board of Trade having been first obtained. 46. Nothing contained in this order shall authorise the company to take, use, or in any manner interfere with, any land, or hereditaments, or any rights of whatsoever description belonging to the Queen's Most Excellent Majesty in right of her Crown, and under the management of the Commissioners of Woods, without the consent in writing of the Commissioners of Woods on behalf of Her Majesty first had and obtained for that purpose (which consent such Commissioners are hereby authorised to give), neither shall anything in this order contained extend to take away, prejudice, diminish, or alter any of the estates, rights, privileges, powers, or authorities vested in, or enjoyed, or exercisable by, the Queen's Majesty, her heirs or successors." In the schedule Part I. specified the rates for the use of the pier, which were, inter alia, "for every passenger landing on the pier from or embarking from it on board of any ship, vessel, packet, or passage boat . . . . 4*d.*" Part II. contained the rates for passengers' luggage. Part III. specified

the rates "on vessels mooring or anchoring within the limits specified in the order."

The company, in purported pursuance of this order, constructed a pier (except the landing-stage) at Llandrillo-yn-Rhôs. The pier was constructed partly on the foreshore, partly on land above the foreshore, and partly on the bed of the sea below the foreshore, and was known as the Rhôs Pier, Colwyn Bay. The land above the foreshore was acquired by the company in June, 1892, from a private owner, and on this land they constructed the base of and the approaches to the pier. In November, 1892, they mortgaged this land to their bankers, who in 1896 sold it to one Horton.

In June, 1893, the company obtained a grant from the Board of Trade, acting on behalf of the Crown, of the portion of bed of sea below the foreshore which formed part of the site of the pier. The portion of the foreshore which formed the site of the remainder of the pier was acquired by the company in 1894 and 1896 under two leases from the Commissioners of Woods and Forests, acting on behalf of the Crown, for terms of eighty years respectively.

In June, 1897, the company went into liquidation, and in November, 1897, the liquidator, with the consent of the Board of Trade, sold and conveyed the company's undertaking and pier to parties named Bostock, Hill, and Bliss, who in November, 1898, sold the pier and undertaking to Horton, and assigned the two leases by his direction to a trustee for him.

Early in 1900 Horton completed the pier by erecting a landing-stage at the seaward end thereof, but shortly afterwards for the first time discovered that no part of the pier had been constructed according to the line of works delineated on the deposited plan; that the seaward end of the pier for upwards of 400 feet was entirely outside the limits of deviation; that the Board of Trade had not sanctioned any deviation as required by s. 11 of the provisional order; that the time allowed for the construction of the pier by s. 43 of the order had expired; and that by reason of these facts the Board of Trade had not given their certificate as provided by s. 13 of the order. Thereupon, with the view of perfecting his title to the pier, he caused the two leases to be

NEVILLE J. 1908 — LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

surrendered to the Crown, and in February, 1901, obtained from the Commissioners of Woods and Forests, acting on behalf of the Crown and under the powers of the Crown Lands Act, 1829, a grant of the foreshore and bed of the sea on which the pier was constructed.

From 1901 to the end of June, 1907, the plaintiffs from time to time ran excursion steamers to the pier and paid the rate of 3*d.* per passenger that Horton charged them. In June, 1907, Horton leased the pier to the defendant company as from June 29 and let them into possession, and they on June 30 raised the passenger rate to 4*d.*, which the plaintiffs paid for a few days under protest. On July 19 the defendant company informed the plaintiffs that their steamers would not be allowed to come alongside the pier to land or embark passengers except on payment of a fixed rental of 450*l.* for the season. The plaintiffs refused to pay, and commenced this action against the defendant company and Horton claiming an injunction to restrain the defendants from excluding the plaintiffs, their servants and passengers by their steamers, from the pier and from preventing the plaintiffs from landing or embarking passengers at or from the pier, and repayment of all sums unlawfully claimed by and paid to the defendants. On July 31, on motion for an interim injunction, the following order was made: "The plaintiffs by their counsel undertaking until judgment or further order without prejudice to any question, and in particular without prejudice to the defendant company's claim to payment of a proper proportion of the 450*l.* claimed by them, to pay the defendant company at the end of every week (the first week to commence on July 31, 1907) all or any tolls or rates which would be payable by them, and also all or any tolls or rates which would be payable by or in respect of passengers for or from the plaintiffs' steamships under the provisional order of 1892 in the writ of summons mentioned on the assumption that such order is a valid and operative order and that the defendants are the undertakers thereunder, and the plaintiffs by their counsel undertaking to keep proper accounts . . . . and the defendant company by their counsel undertaking for the like period subject to such payment as aforesaid not to exclude the plaintiffs, their servants or passengers or plaintiffs'

ships, from the pier: This Court doth not think fit to make any order upon this application other than that the costs thereof be costs in the action." Immediately after the order the defendant company also claimed that they were entitled under the order to charge the plaintiffs' steamers when calling at the pier with the tonnage rates for vessels "mooring or anchoring within the limits" specified in the provisional order.

The plaintiffs by their statement of claim alleged (as the fact was) that no list of rates had been affixed at the pier pursuant to s. 47 of the Harbours, Docks, and Piers Clauses Act, 1847; that the defendants were not, nor was either of them, legal owners or lessees of the pier; that all the sums demanded and received as rates or tolls from the plaintiffs by the defendants were illegally demanded; that by reason of the defendants' wrongful acts aforesaid the plaintiffs were unable to use the pier; and they claimed relief as above stated.

The defendants by their defence alleged that the plaintiffs knew all the facts relating to the pier; that the pier was the private property of the defendant Horton, and that the plaintiffs were not entitled to use it except upon payment of the remuneration that the defendants required; that under the circumstances the plaintiffs were estopped from asserting that the defendants were not entitled to the pier and to charge the rates and tolls they had charged; that at any rate the plaintiffs were bound, after the order of July 31, 1907, to pay the same rates and tolls as would have been payable on the assumption that the provisional order was valid: alternatively, they submitted that the plaintiffs were not entitled to use the pier or the approach thereto without paying the rates and tolls provided for by the provisional order respecting the pier, or charges based upon the said rates and tolls. And the defendant company counter-claimed for payment of the sums due to them from the plaintiffs for passenger tolls and mooring rates. The defendant Horton also counter-claimed for payment of 15*l.* due to him from the plaintiffs for the use of an office on the pier during May and June, 1907.

Peterson, K.C., and *Maugham*, for the plaintiffs. Under ss. 2, 25, 33, and 47 of the Harbours, Docks, and Piers Clauses Act,

NEVILLE J. 1908

LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

1847 (1), and ss. 6, 13, 17, and 19 of the General Pier and Harbour Act, 1862 (2), the public have a right of access to a pier when completed on paying the tolls authorized by the Acts and the provisional order. Here the pier is completed, and the plaintiffs, as members of the public, have a statutory right of access to the pier, but no rates are payable, first, because no certificate was given by the Board of Trade under s. 13 of the order; and, secondly, because the defendants are not the authorized undertakers within s. 19 of the order, the conveyance of November, 1898, to Horton not

(1) The Harbours, Docks, and Piers Clauses Act, 1847, enacts:—

Sect. 2 defines (inter alia) the expression "the undertakers" to mean "the persons by the special Act authorized to construct the harbour, dock, or pier, or otherwise carry into effect the purposes of the special Act with reference thereto."

Sect. 25: "Except where it is otherwise provided by the special Act the undertakers shall not take any rate until the harbour, dock, or pier in respect of the use of which the same is payable is completed and fit for the reception of vessels, or other the purpose for which the same is intended."

Sect. 33: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."

Sect. 47: "The undertakers shall from time to time cause to be painted on boards, or to be printed and attached to boards, in large and legible characters, a list of the several rates for the time being payable, and shall cause such boards containing such lists to be fixed in front of the principal office of business of the undertakers, and on some conspicuous part of the quays of the harbour, dock, or pier; and no rate shall be payable during such time as such list is not so affixed, nor shall any rate not specified in such list be payable: . . . ."

(2) The General Pier and Harbour Act, 1862, enacts:—

Sect. 6 applies Part II. of the Act to every provisional order of the Board of Trade.

Sect. 13: "On payment of the rates payable under a provisional order, and subject to the provisions of the principal Act" (the General Pier and Harbour Act, 1861) "and this Act and the provisional order, the pier or harbour to which the provisional order relates and its approaches shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers, and such persons and passengers shall have unobstructed ingress, passage, and egress into, along, through, and out of the same."

Sect. 17: "All rates levied under any provisional order shall be charged equally to all persons with respect to the same description of vessels and the same description of goods."

Sect. 19: "Subject to the provisions of the principal Act and this Act and any provisional order, the Harbours, Docks, and Piers Clauses Act, 1847, shall be deemed to be incorporated with every provisional order."

having been sanctioned by the Board of Trade. Further, the company had no power to mortgage except as authorized by s. 30 of the order: *Baroness Wenlock* v. *River Dee Co.* (1) Therefore the mortgage to the bank was void, and Horton did not obtain a good title to the land above the foreshore from the bank. Moreover, the conveyance of November, 1898, to Horton being bad, the leases of the foreshore are still outstanding in Bostock, Hill, and Bliss. Therefore the conveyance by the Crown to Horton of the foreshore is void, because it purports to be a grant in fee in possession, whereas it only passed the reversion of the leases, and the Crown must be taken to be deceived: the *Case of Alton Woods* (2); *Alcock* v. *Cooke* (3); *Gledstanes* v. *Earl of Sandwich* (4); Blackstone's Commentaries, vol. i. p. 246. No doubt the Crown can grant the foreshore, but subject to existing rights and to the public rights of navigation: *Gann* v. *Free Fishers of Whitstable* (5); but the Crown cannot grant the bed of the sea below low-water mark: *Reg.* v. *Keyn*. (6) Another objection to the conveyance of 1901 is that it is a conveyance from the Commissioners of Woods and Forests under the Crown Lands Act, 1829, but it ought to have been a conveyance from the Board of Trade under the Crown Lands Act, 1866. But if that conveyance is operative, it is subject to our statutory rights, as members of the public, to use the pier, and no private individuals or undertakers can exclude us from the pier or levy rates unless they comply with s. 47 of the Harbours, Docks, and Piers Clauses Act, 1847; and under the circumstances the defendants are estopped from saying that the pier is not the pier authorized by the provisional order.

[NEVILLE J. My present view is that this pier was not the pier authorized by the provisional order, and that there is no authority for it. Whether or not the conveyance to the defendant Horton from the Crown is good or bad does not, I think, make the slightest difference, because I do not suppose that it would be contended that the Crown by that conveyance

(1) (1885) 10 App. Cas. 354.
(2) (1600) 1 Rep. 40b, 48b.
(3) (1829) 5 Bing. 340.
(4) (1842) 4 Man. & G. 995, 1028.
(5) (1865) 11 H. L. C. 192.
(6) (1876) 2 Ex. D. 63, 67, 159.

NEVILLE J. 1908 LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

exhibited any intention of granting a franchise of any kind. Consequently, the question whether the bed of the sea is now vested in the Crown or in the defendant Horton seems to me to be wholly immaterial. The result is that from my point of view the pier is a public nuisance; and I think there is no question of estoppel, because it seems to me that the public cannot at the same time have two inconsistent rights—that is to say, they cannot by estoppel have the right to say, "We are entitled to treat this pier as the authorized pier and on paying our tolls to use it," and at the same time to say, "This pier is unauthorized, and a public nuisance." It seems to me, therefore, as at present advised, that nobody can recover anything for the use of the pier and, on the other hand, that nobody can get an injunction restraining anybody else from interfering with the use of the pier, and that it is a case in which Parliament must be resorted to in order to legalize the situation.]

It is submitted that the defendants cannot justify possession of the pier except under the provisional order, and cannot say the pier is an unauthorized structure, and therefore the plaintiffs are entitled to an injunction; and, as the rates have been illegally collected, we are entitled to repayment of the rates paid under protest since July 1, and also those paid without prejudice under the order of July 31: *Parker* v. *Great Western Ry. Co.* (1) Lastly, on the evidence, the plaintiffs' steamers when alongside the pier and made fast to it for a short time to land and embark passengers are not "moored" within the meaning of the provisional order: *Attorney-General* v. *Wright.* (2)

Jenkins, K.C., and *E. P. Hewitt*, for the defendant Horton. We do not admit that the pier is per se a public nuisance. It is a question of fact that cannot be decided in the absence of the Attorney-General. The plaintiffs ought to have proceeded by information: *Attorney-General* v. *Parmeter.* (3) This is not an action to abate a nuisance, but a claim for an injunction to restrain us from preventing the plaintiffs from using the pier, and the

(1) (1844) 7 Man. & G. 253. (2) [1897] 2 Q. B. 318.
(3) (1811) 10 Price, 378.

plaintiffs are estopped from denying that it is the Board of Trade pier. Our contention is that it is a statutory pier, because after the Board of Trade were informed that Horton had purchased the pier from the assigns of the liquidator they wrote asking if the transfer had been completed; that was equivalent to a consent in writing. But if it is not a statutory pier, Horton acquired a good title to it under his grant from the Crown. We admit that conveyance was not intended to grant a franchise, but it did operate to convey certain land with the erection upon it, and the *Case of Alton Woods* (1) does not apply. We rely on s. 73 of the Crown Lands Act, 1829.

[NEVILLE J. I think that if the pier is unauthorized it is something in respect of which no rates can be charged.]

Assuming that the pier is not the statutory undertaking, Horton is in possession of the land on which it stands, and the question is, Can a grantee from the Crown hold this pier extending over the foreshore into the sea? The Crown can grant the foreshore to a subject: *Attorney-General* v. *Burridge* (2); and we contend that the Crown is also owner of the bed of the sea below the foreshore, at any rate within the three miles limit. We admit that the grantee holds it subject to the rights of navigation, and until it is shewn that those rights are interfered with there is no nuisance and *Reg.* v. *Keyn* (3) does not apply. Here there is no evidence of obstruction to public navigation, and Horton, being in possession of the pier and of the land above high-water mark, is in the same position as an ordinary owner of land and is entitled to charge the public for coming on to it. Therefore the plaintiffs are not entitled to recover the sums they have paid.

E. P. Hewitt (*Butcher, K.C.*, with him), for the defendant company, adopted the same line of argument. Even if the pier is a nuisance, the base and approaches of the pier are on land above high-water mark in lease to us, and the public are not entitled to pass over our land to the pier without paying us our charges. Therefore the plaintiffs are not entitled to repayment of the rates they have paid because they have had full

(1) 1 Rep. 40b, 48b. (2) (1822) 10 Price, 350, 369.
(3) 2 Ex. D. 63.

NEVILLE J. 1908 LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

consideration for their payments, and *Parker* v. *Great Western Ry. Co.* (1) does not apply.

[NEVILLE J. referred to *Dimes* v. *Petley*. (2)]

Then, as to the "mooring" rates, it is submitted that a steamer is "moored" when made fast alongside the pier to embark and disembark passengers, and that there is no time limit within which she must be there before she is "moored."

Peterson, *K.C.*, in reply.

June 4. NEVILLE J. The plaintiffs, a steamship company, claim to be entitled to use a pier at Colwyn Bay, of which at the date of the writ the defendant Horton was the owner and the other defendants the lessees. By a provisional order made in 1892 power was given to the Colwyn Bay Pier Company, Limited, to construct a pier as described in the provisional order and delineated on the deposited plan, with power, with the consent of the Board of Trade, to deviate the same laterally to any extent not exceeding the limits of deviation marked on the plan. The pier company obtained under two leases from the Crown the land required for the erection of the authorized pier, which extended from high-water mark to a considerable distance below low-water mark, the total length being 500 yards or thereabouts. For some reason unexplained a pier was built, which started at or near the point indicated in the provisional order and deposited plan, but which, for about 130 yards of its length, was built altogether outside the limits of deviation. The defendant Horton having acquired, as he alleges, the beneficial interest in the undertaking and leases from the assigns of the liquidator of the pier company, obtained in 1901, upon the surrender of the leases, a grant from the Crown of, with other land, the soil upon which the pier stood with the erection then upon it. Objection is taken by the plaintiffs to Horton's title, upon the ground that the consent in writing of the Board of Trade was required under the terms of the provisional order to any assignment to him and was not obtained, and consequently that the leases were still outstanding in the assigns of the liquidator, and the grant from the Crown was void within the principle of the *Case of Alton*

(1) 7 Man. & G. 253. (2) 15 Q. B. 276.

Woods. (1) It appears to me unnecessary to decide this point. In my opinion the construction of the existing pier was unauthorized, and no statutory rights arose upon its construction either in favour of Horton and his predecessors or in favour of the public. I have no doubt that this pier, some 500 yards long, constructed mainly of iron and embedded in the foreshore and the bed of the sea, is an obstruction to the right of navigation by the public, which in the eye of the law amounts to a public nuisance, the abatement of which could be obtained upon information, and the maintenance of which is an indictable offence. Under these circumstances what are the rights of the parties in the present action? The plaintiffs claim, as members of the public, to enforce rights which they allege to be vested in them by the provisional order, and say that the defendants cannot be heard to say that the pier is not the authorized pier, they having held themselves out as the undertakers under the provisional order. Assuming that the defendants have so held themselves out, I fail to see any ground upon which I can hold them to be estopped from shewing the true facts of the case. I do not think the public are entitled to elect whether they will treat the obstruction as a nuisance or adopt it as the authorized undertaking; and at all events the plaintiffs, as individual members of the public, cannot, it seems to me, do so. I think, therefore, that there are no rights in regard to the pier which the plaintiffs can enforce in the present action.

In the next place, Can they recover the amount, some 6*l.*, which they paid to the defendants, the Mersey Trading Company, under protest and before action, for the use of the pier? The position was, I think, as follows. On the one hand the defendants were entitled to exclude the plaintiffs from the pier: see *Colchester Corporation* v. *Brooke* (2); *Dimes* v. *Petley*. (3) I will assume, on the other hand, that the defendants could not in a Court of law recover anything whatever from the plaintiffs for the use of that which in the eye of the law was a public nuisance. The plaintiffs desiring to make use of the pier and the defendants asserting a

(1) 1 Rep. 40b. (2) (1845) 7 Q. B. 339.
(3) 15 Q. B. 276.

NEVILLE J. 1908 LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED v. MERSEY TRADING COMPANY, LIMITED.

right to exclude them, the plaintiffs pay under protest to the defendants rates and tolls demanded by the latter. It turns out that the defendants were in fact entitled to exclude the plaintiffs from the pier, although they were not entitled to charge tolls to the public or to recover in an action for the use of the pier. It seems to me that the plaintiffs, having used the pier and received consideration for the payment, cannot recover the money back. Had it turned out that they were legally entitled to use the pier, of course the result would have been different. Similar considerations apply to the payments, amounting to some 30*l.*, which have been made under the order in the present action of July 31, 1907. In my opinion, upon the fair construction of this order, the payments were to be made as the price for the use of the pier pending the trial of the action. The plaintiffs cannot, I think, having used the pier under this order in an action in which they have failed to establish any right, resist the payment of the consideration therein provided. This brings me to the last point—namely, whether the defendants are entitled to "mooring" rates under this order. This depends, I think, upon the construction of the provisional order. The question is what is meant by the word "mooring." Does it, as used here, include the case of a vessel merely coming alongside to embark or disembark passengers? Evidence has been called on both sides which has satisfied me that "mooring" has no technical meaning other than its general meaning in the English language, and that some seafaring persons would apply it to every case in which a vessel is made fast in any way, while others would not. If vessels simply calling to land and embark passengers are "moored" within the meaning of the provisional order, then by s. 38 of the provisional order the company could exclude such passengers at will, whereas by s. 28 the company are prohibited from excluding them, even at times when they are entitled to "close the pier against the public." No persons could safely land or embark from the pier without in some manner making fast. I think, therefore, that the mooring or anchoring mentioned in s. 38, which is, I think, the mooring or anchoring for which the rates are payable, cannot include the making fast of vessels for the purpose merely of landing or embarking passengers. I must

therefore dismiss the action against both defendants with costs. The defendant Horton on his counter-claim recovers 15*l.* without costs; and the counter-claim of the Mersey Trading Company is dismissed with costs.

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool; Warwick Webb & Co.*

H. L. F.

BUTTERLEY COMPANY, LIMITED *v.* NEW HUCKNALL COLLIERY COMPANY, LIMITED.

NEVILLE J.
1908
June 16, 17, 18, 19, 20.

[1907 B. 4648.]

Mines—Overlying and underlying Seams of Coal—Right to Support—Subsidence—Injunction.

In 1887 the Duke of Portland granted the plaintiffs a long lease of the seam of coal nearest to the surface of and underlying a large area of land, with usual powers to work and carry away the coal. The lease provided that it should be lawful for the Duke and his assigns to enter upon the mining area of the plaintiffs and to sink to and work the mines underlying the plaintiffs' mine, and that in such case they should indemnify the plaintiffs against any physical damage that might be caused by the operations of the tenants of the underlying mines to the mine or mining apparatus of the plaintiffs. In 1893 the Duke granted the defendants a lease of the uppermost seam of coal underlying the plaintiffs' seam, with usual powers to sink to, work and carry away the coal. The defendants' seam was 170 yards below the plaintiffs' seam. The defendants worked their seam in a reasonable and proper manner, and the necessary and inevitable result of their working was to let down the plaintiffs' seam and render it more difficult to work. In an action by the plaintiffs to restrain the defendants from so working their seam as to cause subsidence in the plaintiffs' seam:—

Held, that the proviso in the plaintiffs' lease did not expressly or by necessary implication reserve to the Duke and his assigns the right to withdraw support from the plaintiffs' seam, and that the plaintiffs were entitled to an injunction.

The principle of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, applied.

ACTION.

By an indenture of lease dated January 25, 1887, the Duke of Portland, as tenant for life under a settlement and under the

NEVILLE J. 1908 BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED.

powers of the Settled Land Acts, demised to the plaintiffs a seam of coal known as the Top Hard Seam, lying under some 6700 acres of freehold and copyhold lands, "all which said freehold and copyhold lands are situate in one or other of the parishes of Kirkby-in-Ashfield, Annesley, Fullwood, and Sutton-in-Ashfield in the county of Notts and are down to and including the Top Hard Seam aforesaid hereinafter referred to as the 'mining area' or 'the area,'" with usual powers of working, winning and carrying away the coal, for the term of sixty years from March 25, 1885, at the rents and royalties therein mentioned. And it was thereby agreed and declared that the beneficial reversioner or reversioners would not let the mines underlying the Top Hard Seam to any person or persons other than the plaintiffs or their assigns without first offering a lease of them to the plaintiffs or their assigns, and, if they should fail to accept such lease in writing within six calendar months after such offer, would not let the said underlying mines at lower rents or royalties to any person or persons other than the plaintiffs or their assigns without first offering a lease of them to the plaintiffs or their assigns at such reduced rents or royalties. "In case the said beneficial reversioner or reversioners shall consistently with the provision lastly hereinbefore contained have let the underlying mines to any person or persons other than" the plaintiffs or their assigns, "it shall be lawful for the said reversioner or reversioners and his or their tenants of such underlying mines (subject as to the said copyhold lands to the copyhold estates affecting the same respectively) to enter upon any part or parts of the mining area aforesaid and to sink to, work, get and carry away all or any of the said underlying mines, and for the purposes aforesaid or any of them to sink, make, erect and use all such pits buildings engines machinery roads works and conveniences upon through or under all or any of the same lands and over under or across all or any of the roads ways levels and workings of the lessees or their executors administrators or assigns as shall be necessary or expedient so that such roads ways levels and workings be not unnecessarily injured thereby, and in such cases the said lessees their executors administrators or assigns shall leave such pillars or ribs of coal and other

minerals as the said beneficial reversioner or reversioners or his or their mining agent shall require on account of the shafts buildings and works necessary or proper for working such underlying mines, for which pillars and ribs of coal and other minerals so left no royalty, rent or sum of money shall be paid. Also in such cases the beneficial reversioner or reversioners shall indemnify the said lessees their executors administrators or assigns against any physical damage that may be caused by the operations of the said tenants of the said underlying mines to the mines or mining apparatus of the said lessees their executors administrators or assigns." The lease contained a covenant by the plaintiffs to leave a barrier of coal sixty yards thick between the Top Hard Seam demised to them and any adjoining seam belonging for any estate of interest to or authorized to be worked by them.

By another lease dated February 11, 1892, the Ecclesiastical Commissioners for England demised to the plaintiffs (thereinafter referred to as "the company") the Top Hard Seam lying under some 200 acres of glebe land in the parish of Kirkby-in-Ashfield aforesaid (thereinafter referred to as "the said lands") with full powers (subject and except as thereinafter excepted) of working, winning and carrying away the coal for the term of sixty years from March 25, 1891, at the rents and royalties therein mentioned. This lease contained an exception and reservation of full power and authority for the lessors and their lessees during the term thereby granted to win, work and carry away all minerals under the said lands other than the seam of coal thereby demised, and for that purpose to sink, drive and use all such pits, shafts, &c., and other works through, across, over, along and under the seam of coal thereby demised, and through, across, over and under any levels or workings of the plaintiffs as should be necessary or convenient, "Provided always that neither the lessors nor the persons or person exercising the liberties, powers and authorities hereby reserved or any of them shall be liable to the company their successors and assigns for any damage or injury that may be caused to the premises hereby demised or any part thereof or to the drifts levels adits watercourses rail and road engines machinery and works constructed

NEVILLE J. by or belonging to the said company their successors or assigns by reason of the due and proper exercise of the liberties powers and authorities hereby reserved or for any loss arising to the said company consequent upon such damage injury and interruption as aforesaid."

1908

BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED.

The Top Hard Seam was the nearest seam to the surface, and under their said leases the plaintiffs went into possession of it and worked it continuously from two collieries known as the Portland Colliery and the Kirkby Colliery. The uppermost workable seam underlying the Top Hard Seam, and lying about 170 yards below it, was the Deep Soft Seam. In 1892 the Duke offered a lease of the Deep Soft Seam under the same area to the plaintiffs, who declined it, and subsequently in August, 1893, he granted a lease of it to the defendants, who also obtained a lease of the same seam from the Ecclesiastical Commissioners so far as it underlay the 200 acres of glebe land. The defendants worked the Deep Soft Seam continuously, and for some years prior to March, 1907, the plaintiffs from time to time sent in to the Duke claims for damage caused in their mine by the workings of the defendants. The Duke paid the amount of the claims and was repaid by the defendants. In 1907 the plaintiffs experienced much greater difficulty in working the Top Hard Seam, the damage in their workings increased, and some subsidence was caused. Thereupon they commenced this action, and by their statement of claim alleged that it was of the utmost importance to them to maintain a solid unworked barrier of coal between their said two collieries in order that the water which would accumulate in the Portland Colliery when the coal there had been worked out might not find its way into and drown the Kirkby Colliery, and with that object they had set out and maintained a barrier in the Top Hard Seam forty yards in width between their two collieries; that the plaintiffs' leases did not reserve powers to the lessors to withdraw support from the Top Hard Seam, and that they were entitled to have the Top Hard Seam supported by the seam in lease to the defendants; that the defendants were working the Deep Soft Seam in such a way as to cause the Top Hard Seam to subside, and that the damage caused by such subsidence was serious, and in particular

had weakened and injured the said barrier of coal in many places; and they claimed an injunction to restrain the defendants from further working the Deep Soft Seam in such a manner as to cause the Top Hard Seam or the plaintiffs' works and buildings connected therewith to crack or subside and from otherwise injuring the same. The defendants by their defence alleged that the barrier of coal maintained by the plaintiffs was not in accordance with, but in breach of, the covenants in the plaintiffs' leases; they denied that the plaintiffs were entitled to the support they claimed, and alleged that on the true construction of the plaintiffs' leases they (the defendants) were entitled to withdraw support from the Top Hard Seam; and in particular they alleged that under the reservations in the plaintiffs' leases they were entitled, as against the plaintiffs, to work and carry away all the Deep Soft Seam underlying the Top Hard Seam upon indemnifying the plaintiffs against any physical damage thereby occasioned, and that they had paid the plaintiffs for all such physical damage, and that the plaintiffs by accepting such payments over a period of years had acquiesced in the defendants so working their seam as to withdraw support from the plaintiffs' seam, and that under the circumstances the plaintiffs were estopped from claiming an injunction.

The plaintiffs, in reply, alleged that the defendants' lease from the Duke was not consistent with the terms with regard to underletting contained in his lease to the plaintiffs, on the ground that he had not offered the Deep Soft Seam to the plaintiffs on the same terms that he had let it to the defendants; but this point was not argued.

The defendants had still some 1500 acres of unworked Deep Soft Seam underlying unworked Top Hard Seam in lease to the plaintiffs, and it appeared from the evidence that the defendants worked the Deep Soft Seam on the long wall system, the recognized method in the district; that their workings were carried on in a reasonable and proper manner; and that the necessary result of their workings was to cause subsidence in the plaintiffs' mine.

C. A. Russell, K.C., and *MacSwinney*, for the plaintiffs. Assuming that the defendants' lease is a good exercise by the

NEVILLE J. 1908 BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED.

Duke of the power to let underlying seams reserved to him by the plaintiffs' lease, the plaintiffs are nevertheless entitled to support. The right of the owner of the surface to support from underlying minerals is well settled, and that common law right to support is not limited to the case of the surface owner. The same principle applies to strata under the surface. Here the Duke, having granted the Top Hard Seam to the plaintiffs, could not prima facie do anything which would be a derogation from that grant, and could not in fact himself work the underlying seam so as to let down the plaintiffs' seam unless he had in the grant reserved that right in express words or by necessary implication, and the defendants are in no better position: *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1); *Love* v. *Bell* (2); *Davis* v. *Treharne* (3); *New Sharlston Colliery Co.* v. *Earl of Westmorland* (4); *Markham* v. *Paget.* (5) The right to sink to and work and carry away the underlying minerals is not of itself sufficient to deprive the plaintiffs of their right to support, and the compensation clause is referable to injury arising from other matters than subsidence. The question of the right to support between overlying and underlying seams of coal arose in *Mundy* v. *Duke of Rutland* (6), where an injunction was granted. There the Court of Appeal said that if you want to reserve the right to let down the overlying seam you must reserve it in plain and clear language. The onus is on the defendants to shew that the right to work the underlying seam so as to let down the plaintiffs' seams is expressly or by necessary implication reserved to the Duke and his lessees, but there is nothing in the lease to shew that such a right is reserved. The same observations apply to our lease from the Ecclesiastical Commissioners.

Astbury, *K.C.*, and *H. T. Waddy*, for the defendants. In the first place, the reservation to the Duke in the plaintiffs' lease of the right to work the underlying mines is amply sufficient to justify the whole of the defendants' workings, so that they do not come within the decision of the *Butterknowle Case* (1) and the

(1) [1906] A. C. 305.
(2) (1884) 9 App. Cas. 286.
(3) (1881) 6 App. Cas. 460.
(4) [1904] 2 Ch. 443, n.
(5) [1908] 1 Ch. 697.
(6) (1883) 23 Ch. D. 81.

authorities there cited, all of which are cases dealing with surface rights. But whatever the principle of the decisions as to surface rights may be, that principle has never been applied to the case of overlying and underlying mines under the surface except in the case of *Mundy* v. *Duke of Rutland* (1), which is distinguishable from the present case. Secondly, the working of the lower seams cannot be a derogation from the plaintiffs' grant, which was made on the express terms that the lower seams would be worked and that compensation should be paid for the inevitable result of working them; and where it is perfectly plain that the common law right of support from the underlying strata was not intended to be left, because it was intended that the underlying strata should be worked out and carried away, it is submitted that the principle of the *Butterknowle Case* (2) does not apply. Thirdly, if the damage which the lease provides shall be paid can only be attributable to that caused by subsidence, then the right to remove support is necessarily implied. Here the defendants are practically in the same position as the Duke, and what he has to pay for is damage done (1.) to the mine, and (2.) to the apparatus; but it is common knowledge that it is impossible, apart from the sinking of a shaft (which is provided for), to physically damage an upper seam by working a seam some 170 yards below it except by subsidence, and this entirely differentiates this case from the *Butterknowle Case*. (2) Moreover, the plaintiffs have for years stood by, knowing that we were causing them this damage and that they were claiming and getting paid for it, and it is inequitable that they should now ask for an injunction against damage arising from our workings that has been and can be measured by compensation. Lastly, in *Mundy* v. *Duke of Rutland* (1), which is not cited in the *Butterknowle Case* (2), the Court of Appeal held the reservation in the lease to be utterly unintelligible and ruled it out, and then applied the principle of the common law right of support. Here there is no qualification, such as there was in that case, of the right to work the lower seam, and the summary of the general law by Kay J. at p. 89, where he says, "From this it appears that the degree of support for underlying strata is not necessarily

(1) 23 Ch. D. 81. (2) [1906] A. C. 305.

NEVILLE J. 1908 — BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED.

the same as for the surface," has never been questioned. Letting down the plaintiffs' seam two feet does not prevent them from getting the coal and selling it at the same price; it only makes the working of it more difficult, and that is physical damage, and their only right is to claim it from the Duke. The reservation in the lease of the Ecclesiastical Commissioners is more strongly in our favour.

MacSwinney, in reply, referred to *Humphries* v. *Brogden*. (1)

NEVILLE J. In this case the plaintiffs, the Butterley Company, Limited, sue the defendants, the New Hucknall Colliery Company, Limited, seeking an injunction restraining the defendants from working a mine underlying a mine of the plaintiffs, and for an inquiry as to damages occasioned by the workings that have already taken place. The facts are very short, and, so far as they are necessary for the determination of the question before me, are not in any serious sense disputed. By a deed dated in 1887 the plaintiffs acquired on the Duke of Portland's estates a lease of a mine known as the Top Hard Seam, underlying a very considerable tract of country, with certain ancillary powers and liberties, and in the lease was contained a reservation on behalf of the beneficial reversioner or reversioners, whom I will treat as the lessors, which was subject to a condition that any lease of the lower mines should, in the first instance, be offered to the plaintiffs. I need not deal in detail with the terms of that condition, because, in the view I take of the case, whether or not that condition was complied with becomes immaterial. I think the only point I have to consider is whether upon the construction of the lease I can hold that the lessor has expressly or by necessary implication reserved the right to remove the underlying support of the mine which has been demised to the plaintiffs. Now the only material facts which arise at the present moment are that the defendants, who are also lessees of the Duke, purporting to take their lease under the terms of the conditional reservation that I have referred to, have so worked the Deep Soft Mine, of which they are lessees, as to cause subsidence to the plaintiffs' mine and to cause them substantial damage. That

(1) (1850) 12 Q. B. 739, 747.

being so, I think the plaintiffs are entitled to the relief for which they ask, unless I can hold that the reservation was sufficiently extensive to include a right to occasion subsidence to the mine demised to the plaintiffs. Having regard to the knowledge of the present day that the extraction of the mines underlying the upper strata does, as a matter of practical business, necessarily lead to their subsidence, I should, were I uncontrolled by authority, feel a difficulty in resisting the argument of the defendants that upon the natural construction of the words used in the present lease it was intended that the future lessees of the underlying mines should have the right in working their mines to occasion subsidence; but I do not think that I am able to deal with the construction of this lease uncontrolled by what I think are rules of construction in similar cases, which have been laid down from time to time, and all of which were considered and dealt with by the House of Lords in the case of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (1) I think I am bound to accept the summing up of the decisions by Lord Macnaghten in that case as declaring the law with regard to the relative rights of the owners of overlying and underlying strata with regard to support. Let me say here that I can see no sound distinction between the case of a surface owner and the case of any other owner of the overlying stratum or strata of ground. It seems to me that the observations of Lord Campbell in *Humphries* v. *Brogden* (2) apply with equal force to the case of a surface owner and to the case of an owner of an overlying mine—that is, that when once you find that the owner is entitled to support of any kind, it is idle to talk of reasonable support, because there is no standard by which you can gauge the reasonableness of the support from underlying strata. You must have absolute support or you can be entitled to no support at all. It seems to me you can no more readily find a halfway house in the case of an owner of a mine than you can in the case of an owner of the surface, and therefore you must treat the right of support to be a right to adequate support—that is, to maintain the property of the owner, be he surface owner or owner of an overlying mine, in its natural position.

(1) [1906] A. C. 305. (2) 12 Q. B. 739, 747.

NEVILLE J. 1908 BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED.

I think the *Butterknowle Case*(1) is an authoritative statement of the law which I have to apply in coming to a conclusion as to the true construction of the lease before me, and I find it stated in the first instance by the Lord Chancellor that it is to be presumed, in construing such a document as a lease of mines, that a right to let down the mines granted or leased by the grantor by mining operations conducted under the property demised or granted must be presumed not to exist unless there are clauses in the instrument which are inconsistent with the legal presumption of support. That, no doubt, may be either by express words or by necessary implication, but I am not free to say what I consider necessary implication in such a case, as I should be in the construction of a document under ordinary circumstances, because there have been what I can only regard as rules of construction laid down which I am not entitled to depart from, and one is that the granting of mining rights, however full, even if they involve an obligation on the part of the lessee to remove the whole of the minerals, does not in itself grant an accompanying right to let down the surface of the mine; and, further, that where there are compensation clauses the Court will, if the language of the instrument will bear it, attribute the compensation payable to injury other than injury by subsidence; and, moreover, that an absolute right to compensation for injury by working mines does not in itself conclude the question of whether the right to cause subsidence was intended to be reserved on the part of the grantor. Now, bearing those rules in mind, I come in the first instance to the consideration of the meaning of the lease from the Duke of Portland; and it seems to me, and I think it is conceded by the argument of the defendants, that if such a right is to be discovered it must be discovered in the provisions regarding the leases which the lessor retains the conditional right to grant of the underlying mines which were not demised to the plaintiffs; and I find that there is a right to grant leases to persons to enter any part or parts of the mining area, which was an area which included the surface of the overlying mines demised and the intermediate strata down to and including the Top Hard, "and to sink, to work, get, and carry away all or any

(1) [1906] A. C. 305.

of the said underlying mines and for the purpose aforesaid or any of them to sink to, erect and use all such pits, buildings, engines, machinery, roads, works and conveniences upon, through or under all or any of the same lands and over, under or across all or any of the roads, ways, levels and workings of the lessees or their executors, administrators or assigns as shall be necessary or expedient." Then there is a provision as to unnecessary injury which I think I need not read. That is followed by an indemnity given by the lessor "against any physical damage that may be caused by the operations of the said tenants of the said underlying mines to the mines or mining apparatus of the said lessees, their executors, administrators or assigns." I think a question which it is material to answer is whether or not, according to the proper construction of those words, they can be referable to other injury than that occasioned by subsidence. If they can, then I think I must hold them to apply to that, and to apply to that alone, and not to include injury by subsidence. It seems to me that they can, and I think that in considering that question you must take the whole of the clause together, and it is not a question of what has been done or what was likely to be done under the clause, but what is the extent of the power reserved, and if the words reserving the power are sufficient to indicate possibility of damage to the mines, apart from the damage to the mines by subsidence, I ought to attribute that meaning to the words and to exclude the question of subsidence; and it seems to me that, inasmuch as the supposed lessees are given a right to utilize the land and the mine actually demised to the plaintiffs for the purpose of the underlying mines, and to make roads, works, and conveniences over, under or across all or any of the roads, ways, levels and workings of the lessees, it is impossible to say that, in the course of the exercise of such powers, should they come to be exercised at all, injury might not be occasioned to the mines as well as to the mining apparatus of the plaintiffs. Therefore I think, under the rule I have referred to, I am bound to hold that the indemnity was an indemnity against the damage caused by operations other than the causing of subsidence to the plaintiffs' mines. But whether that be so or not, I do not think it could

NEVILLE J.

1908

BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED.

be fairly said here that the existence of an indemnity clause of this kind would be inconsistent with the legal presumption, because here it is an indemnity, and not a question of compensation, and I do not see any reason why the indemnity should not be intended to extend to illegal acts as well as legal acts of the lessees; and, assuming they are not entitled to create subsidence in the plaintiffs' mine and that they did so, it may well be that the lessor would be compelled to indemnify against such acts. I come to the conclusion, therefore, on this lease that there is nothing, apart from the actual reservation of the right to take all the underlying minerals themselves, which is inconsistent with the idea of a continuing support being given to the plaintiffs' mine, and I think I am precluded by authority from saying that the mere reservation of a right to take all the minerals involves the right to let down the overlying strata, be it surface or be it mine. So much for the lease from the Duke of Portland. Then as to the lease from the Ecclesiastical Commissioners I think the case is stronger, because I do not think it can be contended that there is anything there beyond the mere fact of the reservation of the mines which could entitle the lessors to occasion subsidence to the property which they have demised to the plaintiffs. I think, therefore, that I must follow the law as laid down by the House of Lords in the *Butterknowle Case* (1), and that I must hold, upon the construction of these documents, that the right of removing support from the property demised to the plaintiffs was not reserved to the lessors, and consequently the defendants in doing what they have done have been guilty of trespassing against the property of the plaintiffs, and, therefore, the plaintiffs must be protected by an injunction. They are also entitled to an inquiry as to damages, allowance being made for the payments already received by the plaintiffs, and the defendants must pay the costs of the action.

Solicitors: *Thicknesse & Hull; J. P. Garrett, for Watson, Esam & Barber, Sheffield.*

(1) [1906] A. C. 305.

H. L. F.

In re JOHNSON'S PATENT.

PARKER J.

1908

June 27.

[1908 J. 036.]

Patent—Petition for Prolongation—Particulars of Objections—Patents and Designs Act, 1907 (7 *Edw.* 7, c. 29), *s.* 18—*Rules of the Supreme Court (Patents and Designs)*, 1908 (*Order* LIIIa.), *rr.* 3, 17.

Rule 3 of the Rules of the Supreme Court (Patents and Designs), 1908 (Order LIIIa.), forms in itself, taken in connection with the Rules of the Supreme Court which are made applicable, a code by which all questions of practice relating to petitions for the extension of patents are to be governed, and the subsequent rules of the order as to particulars in cases of petitions for revocation and actions for infringement are governed by different considerations.

Rule 3 (*l*) gives the Court considerable latitude as to what particulars of objections to a prolongation should be given, and the considerations which apply are those which apply to pleadings generally. But the objector should at the earliest stage possible give the petitioner particulars of what he relies on as preventing the patent from being novel or from having subject-matter, including a concise statement of what he knows as to any literature, specifications and the like documents relied on.

On October 23, 1894 letters patent were granted to James Johnson for an invention of an "Improved method of and apparatus for extracting moisture from air for blast furnaces and converters" for the term of fourteen years. In March, 1908, James Gayley, of New York, became the registered proprietor of the letters patent.

In April, 1908, Gayley petitioned the High Court of Justice for an order under the Patents and Designs Act, 1907, that the letters patent might be extended for a further term of fourteen years, or such other term as to the Court should seem fit.

On May 28, 1908, the Haslam Foundry and Engineering Company, Limited, and Sir Alfred Seale Haslam gave notice of (inter alia) the following objections to the granting of the prayer of the petition, namely:—

1. That the alleged invention was not novel at the date of the patent.

PARKER J.
1908
JOHNSON'S PATENT, *In re.*

4. That the advantage of eliminating and reducing the moisture was known and appreciated before the date of the patent, and that "methods for accomplishing this had previously been proposed in technical literature available in this country and specifications, both British and foreign, relating to inventions designed to attain such ends" by chemical means and by means of refrigeration.

9. That the allegations contained in the petition were not true in substance or in fact.

On June 4, 1908, the petitioner issued a summons for particulars of—

1. The want of novelty alleged in clause 1 of the objections "stating the name and address of the persons by whom, and the places where, and the dates at and the manner in which the said invention is alleged by the said objectors to have been anticipated or used prior to the letters patent."

2. The technical literature and specifications referred to in clause 4 of the objections.

3. The statements in the petition alleged to be not true in substance or in fact.

Walter, K.C., and *P. F. Wheeler*, for the petitioner. Questions relating to procedure under the Patents and Designs Act, 1907, are to be dealt with, not by that Act, but under the rules made under it which are embodied in Order LIII*a*. of the Rules of the Supreme Court. (1)

Under s. 25 of the Patents, Designs and Trade Marks Act, 1883, a patentee presented a petition for extension of the term of his patent to the Sovereign in Council, and the petition was referred for consideration to the Judicial Committee of the Privy Council. That section is now replaced by s. 18 of the Act of 1907, under which the petition is to be presented to "the Court," which includes, according to Order LIII*a*., r. 1, "the judge of the High Court for the time being selected by the Lord Chancellor as the Court for the purpose of hearing appeals and petitions under the Act." A petitioner under the old practice had to comply with the Privy Council Rules. By the Privy Council

(1) The order is to be found in [1908] W. N., Pt. II., p. 161.

Rules, 1898, r. 4, a party intending to oppose a petition for prolongation had to enter a caveat before the day on which the petitioner applied for a time to be fixed for hearing the matter, and the petitioner had to serve copies of his petition on the parties entering caveats; and within three weeks after such service the opponents had to lodge printed copies of the grounds of their objections to the prolongation. Under similar rules made in 1835 it was held sufficient to state the grounds of objection to the extension without stating all the particulars of the objections: *In re Ball's Patent.* (1) In another case the Court admitted evidence of anticipations beyond those which were given in the objections: *In re Stewart's Patent.* (2) But under Order LIII*a.* more is required of the objector. A person desirous of opposing a petition for extension must, by r. 3 (*j*), lodge a notice of intention to oppose. By r. 3 (*k*) the petitioner then is to serve the objector with a copy of the petition. By r. 3 (*l*) the objector must within three weeks after service of the petition lodge "copies in writing of particulars of the objections upon which he intends to rely against the granting of the prayer of the petition." By r. 3 (*m*) default in lodgment of particulars amounts to abandonment of the opposition; and by r. 3 (*n*) "no person who has delivered such particulars of objection shall be entitled to oppose the granting of the petition on any grounds not stated in such particulars."

The new rules, in fact, attach importance to the delivery of particulars, and the objectors must give particulars of all technical literature, specifications, and information which he knows of or possesses, so that the petitioner may know what case he has to meet. Rule 17 seems to relate only to particulars in infringement and revocation cases; but by r. 24 the new rules are to be "read with the Rules of the Supreme Court," and by r. 2 those rules are to apply "so far as may be practicable (unless by the Act or by these rules otherwise expressly provided) to all proceedings before the Court under the Act." In every case the Court should see that the issues are clearly defined. Every opponent is under the obligation of uberrima fides, and must candidly state in his particulars his full knowledge of the subject. The

(1) (1879) 4 App. Cas. 171. (2) (1885) 3 Rep. Pat. Cas. 7.

PARKER J. 1908 — JOHNSON'S PATENT, *In re.*

Privy Council required the petitioner to state everything belonging to the patent fairly and fully: Lawson's Patents, Designs, and Trade Marks Acts, 3rd ed. p. 100.

Colefax, for the objectors. Inasmuch as the new rules are only dated June 3, 1908, it might be contended that there were no rules in existence as to particulars at the time when these objections were lodged. The objections, however, are in accordance with the new rules, and with the forms given by well-known authors: see Frost's Patent Law and Practice, 3rd ed. vol. ii. p. 414; Terrell on Patents, 4th ed. p. 574. Under the former practice opponents of petitions for prolongation were allowed to object in a general way without being required to particularize, the reason being that it is the duty of the petitioner to go fully into the history of the matter in his petition: *In re Standfield's Patent* (1); and see *In re Hart's Patent.* (2)

[PARKER J. It must be remembered that a petition like this is not a matter between private litigants, but between the patentee and the public. Are not full particulars desirable in such cases?]

The former practice is not altered by the rules; indeed, the old word "grounds" occurs in r. 3 (*n*). It is clear that r. 17 does not apply in the case of a petition for prolongation.

[PARKER J. I think that is so. The rules appear to leave it open to the Court to say in each case what particulars should be given, subject to the general principle that all grounds on which the objector is going to rely must be stated.]

The petitioner knows of specifications which he does not set out.

Sargant, for the Comptroller-General of Patents, Designs and Trade Marks. The comptroller has no objection to the Court making the order asked for. The view of the Board of Trade is that by giving the Court jurisdiction to entertain petitions for revocation rules of Court which apply to other matters before the Court are made applicable, and that particulars of objection should define the issues.

Walter, K.C., in reply.

(1) (1897) 15 Rep. Pat. Cas. 17. (2) (1908) 25 Rep. Pat. Cas. 299.

PARKER J. In my opinion, r. 3 of Order LIII*a*. of the Rules of the Supreme Court forms in itself, taken in connection with the other Rules of the Supreme Court which are made applicable, a code by which all questions relating to petitions for the extension of patents ought to be governed as to matters of practice, and it appears to me that the subsequent rules as to particulars relating to petitions for revocation and actions for infringement of patents are matters of a different sort and governed by different considerations.

It further appears to me that sub-r. (*l*) of r. 3 is drawn in such a way as to give the Court considerable latitude as to what particulars it may in any particular case be necessary and proper for the objector to give. On the one hand, I do not think it would be at all desirable that a bona fide objector to the prolongation of a patent should be bound down by particulars of objection given at an early stage of the proceedings, for he might subsequently acquire valuable evidence on, say, the question of novelty, which it would be his duty to communicate to the Court. On the other hand, it would be only fair, having regard to the nature of the proceedings, that he should be tied down to the particular objections specified in the notice for which provision is made in the rule.

In determining what particulars of the objections on which he is entitled to rely, and of which he gives notice, he ought to give in the document which states the ground of his objections, I think that the considerations which apply are those considerations which apply to pleadings generally. It is, in my opinion, only fair that a petitioner for prolongation of a patent should at the earliest stage possible come to know what it is alleged prevents his patent from being considered novel or from having subject-matter, and on those two points the sooner he gets the information the better for all parties. If, on the one hand, the information that he gets influences him to such a degree that he begins to doubt his own case, he will probably withdraw his petition. If, on the other hand, he finds that it does not so influence him, he will be in a position to explain to the Court, subject to anything the objector may say, the points which have arisen and the points which can be alleged against the contention

PARKER J. 1908 JOHNSON'S PATENT, *In re.*

which he brings before the Court. That is a consideration which has always influenced the Court in dealing with particulars generally, and which, I think, ought to influence the Court in dealing with particulars of objections on an application for prolongation of a patent.

Under these circumstances it appears to me that in the present case the summons for particulars ought to be allowed, subject to anything that may be said as to the particular form of the order. It is clear to me that if on the first part of the summons, namely, novelty, any prior user is intended to be relied on, some particulars of that prior user ought to be given, and it ought not to be sprung upon the petitioner at the trial only, if it be alleged there has been some anticipation by actual prior user. Similarly, if there has been anticipation by a document, the petitioner ought to be informed what that anticipation is, because the existence of that anticipation may lead him to withdraw his petition.

Then, with regard to the second point—as to literature and general knowledge, which really go more to subject-matter than to novelty—I think that, as far as possible, the objector should state concisely what is within his own knowledge as to those documents to which he refers. Of course, an objector has no business to make in his objections a general allegation of that kind without having something to base it upon. I do not say that when he gets to the trial he may not be able to put in further documents than those which he mentions in pursuance of an order for particulars, but I do say that if he does know of such specifications and documents as may be material on the question of subject-matter for an invention, and therefore go to merits, he should concisely state them at as early a stage as possible in the proceedings.

An order was accordingly made that within ten days the objectors should plead the documents on which they relied, and state the names and addresses of the persons, and the places and dates with regard to whom and which prior user was alleged; but no order was made on part 3 of the summons, his Lordship regarding it as a mere traverse. No order was made that in

default of delivery of the particulars the objectors should be precluded from adducing evidence.

PARKER J.
1908
JOHNSON'S PATENT, *In re*

Solicitors for petitioner: *Stevenson & Couldwell.*
Solicitors for objectors: *Bower, Cotton & Bower.*
Solicitor for the comptroller: *Solicitor to the Board of Trade.*

F. E.

In re HERRING. MURRAY *v.* HERRING.

[1907 H. 2205.]

JOYCE J.
1908
April 10, 14; *June* 5.

Will—Construction—Bequest of "all my Debentures" in a Company—Testator holding Debentures and Debenture Stock.

Testator, by his will dated in 1904, bequeathed "all my debentures and preferred and deferred stock in the Municipal Trust Company, Limited." The testator was the chairman of the company, and at the date of his will and at the time of his death in 1906 he possessed, in addition to debentures and preferred and deferred stock, a considerable amount of debenture stock:—

Held, that the debenture stock passed under the bequest.

ADJOURNED SUMMONS.

George Herring, by his will dated October 6, 1904, bequeathed to Mrs. R. R. Murray "all my debentures and preferred and deferred stock in the Municipal Trust Company, Limited." The testator was the chairman of the company. At the date of his will and at the time of his death, on November 2, 1906, he possessed 9700*l.* B 4½ per cent. debentures, 13,276*l.* B 5 per cent preferred stock, 8017*l.* 2 per cent. deferred stock, and 7015*l.* C 4½ per cent. debenture stock. The B debentures were perpetual in the sense that no certain or other date was fixed for repayment. Substantially they were repayable upon the same events as the C debenture stock. In paying interest to a holder of both debentures and debenture stock it was the practice of the company to issue one warrant and a single cheque in respect of both and to denominate the interest "debenture interest." The debentures had priority over the debenture stock, but the security

JOYCE J. 1908 HERRING, *In re.* MURRAY *v.* HERRING.

in each case constituted a floating charge. In the balance-sheets and other documents issued by the company debenture stockholders were referred to as debenture-holders, and interest on both the debentures and debenture stock was styled "debenture interest."

This was a summons taken out by the plaintiff Mrs. Murray for the determination of the question, inter alia, whether the 7015*l.* C 4½ per cent. debenture stock held by the testator passed to her under the bequest above set out.

Hughes, K.C., and *E. Ford*, for the plaintiff. The gift of all the testator's debentures is sufficient to pass the debenture stock which he held. There is no distinction of any substance between the debentures and the debenture stock. They both constitute a floating charge, and there are only slight differences as to the events on which they become payable. Debentures and debenture stock are alike treated by the company on the same footing, and interest on both is styled "debenture interest."

This case is covered by the decision in *Morrice* v. *Aylmer*. (1) It was held in *Oakes* v. *Oakes* (2), where the testator had property at the date of his will to satisfy the words which he used, that you could not import into the gift other property which did not answer the description. *Morrice* v. *Aylmer* (1) shews that a wider view may be taken, and that it is permissible to see whether what is claimed under the gift sufficiently comes within the description used by the testator. The converse of this case is to be found in *In re Nottage* (*No.* 2) (3), where a gift of "debenture stock" was held to pass debentures.

Upjohn, K.C., and *Vaughan Hawkins*, for the residuary legatees. The testator's debenture stock did not pass under the gift. A debenture is a separate and distinct thing from debenture stock. A debenture is a chattel the holding of which secures the ownership in certain rights in the property of the company.

[JOYCE J. Does not "all my debentures" pass debentures of every kind?]

The addition of the word "all" does not make any difference.

(1) (1875) L. R. 7 H. L. 717. (2) (1852) 9 Hare, 666.
(3) [1895] 2 Ch. 657.

It is necessary to shew that the testator possessed something else which was a debenture. The two things are not identical, as in *Morrice* v. *Aylmer*. (1) A gift of "all my debenture stock" would not have carried the debentures, and what applies to one applies to the other. The testator possessed things called debentures, and they are sufficient to satisfy the bequest. There are no words in the bequest aptly describing or referring to the debenture stock, and every word in the bequest is satisfied as being referred to other property: *In re Lane* (2); *In re Weeding* (3); *In re Bodman*. (4)

Younger, K.C., and *Ashworth James*, for the executors and trustees.

Cur. adv. vult.

June 5. JOYCE J. I disposed of most of the questions arising in this case before the last vacation. Upon the remaining one I took time to consider, out of deference to the argument of Mr. Vaughan Hawkins, in whose lamented decease, pending my judgment, we all deplore the loss of a most accurate writer and pre-eminent authority upon that branch of the law with which his name in the minds of the profession will always be specially associated by the title of that model text-book Hawkins on the Construction of Wills.

The question is as to the effect of a bequest by the testator of "all my debentures and preferred and deferred stock in the Municipal Trust Company, Limited." The testator was the chairman of the company, and at the date of his will, October 6, 1904, and at the date of his death, on November 2, 1906, in addition to preferred and deferred stock in this company, he had 9700*l.* debentures of series B and 7015*l.* C debenture stock properly so called. The debentures were what I believe are commonly styled "perpetual"; in other words, no certain or any date was fixed for repayment, and they were only payable in certain contingent events which might or might not happen. Speaking generally, the registered holder might, after six months' default in payment of interest, and before its payment,

(1) L. R. 7 H. L. 717.
(2) (1880) 14 Ch. D. 856.
(3) [1896] 2 Ch. 364.
(4) [1891] 3 Ch. 135.

JOYCE J. 1908 HERRING, *In re.* MURRAY *v.* HERRING.

call in the principal by six months' notice in writing, according to the 11th condition on the face of the debenture, which is in the following terms: "If the company makes default for six calendar months in the payment of interest hereunder, the registered holder of this debenture may at any time thereafter, before such interest is paid, by notice in writing to the company, call in the principal money hereby secured, and in case such notice be duly given, or if an order shall be made, or an effective resolution shall be passed for the winding up of the company, the principal moneys hereby secured shall become immediately payable." There was another series of debentures, A, payable in like or similar manner, the security for these being created by a deed poll. As to the C debenture stock, the trust deed for securing this provided with the help of the conditions on the debentures (condition 1): "The stock shall be redeemed at par when and so soon as the security hereby constituted becomes enforceable, and it is not to be called in previously, and as and when the stock ought to be redeemed in accordance with these presents the company will, subject to these conditions, pay to the trustees or trustee the full amount thereof with all interest to the time of payment." Then clause 9 provides: "The security hereby constituted shall become enforceable in each and every of the events following—that is to say, (1.) if the company shall make default in the payment of any principal moneys or interest which ought to be paid in accordance with these presents; (2.) if the company shall commit any breach in the performance or observance of the obligations hereby imposed on it; (3.) if an order shall be made or an effective resolution passed for the winding up of the company; (4.) if a receiver shall be appointed," and so on. Then clause 2 is: "As and when the stock or any part thereof ought to be redeemed or paid off in accordance with the provisions hereof, the company will pay to the stockholders, or those whose stock ought to be redeemed, or paid off, the full nominal amount of the stock held by them respectively." It thus appears that the nominal amount of the B debentures and the nominal amount of the C debenture stock, with some slight differences, were payable upon the same events; in other words, the debentures were

not payable except upon the same or similar events as the stock. I notice one small difference. The amount of the stock was repayable on the same events and in like manner as the debentures, with a slight difference. Interest in respect of both was payable upon the same dates and at the same rate. When the same person held both (as the testator did) one warrant only and a single cheque were issued for payment of the interest in respect of both, such interest being collectively denominated as "debenture interest." I assume, and I have no doubt it is a fact, that in the case when the payee has no debenture, but only holds C debenture stock, then in accordance with this warrant what is sent to him is a statement of "debenture interest," and the interest due to him is paid really under that denomination. The security in the case of all three, the two sets of debentures and the C debenture stock, was merely a floating charge, though series A had priority over B, and both these series had priority over the debenture stock. Each of the debentures was either for 100*l.* or 50*l.* The stock was transferable in any amount not involving any fraction of 1*l.*

In Lindley on Companies, 6th ed., vol. i. p. 300, it is stated: "The word debenture, though of frequent occurrence in connection with companies, has no definite legal meaning." Another text-writer (1) says: "Debenture stock is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan"; and generally debenture stock differs from a debenture in form rather than in substance. Especially do I think that there was little practical difference in the present case, except, of course, in the order of priority of payment, if it ever became necessary to enforce payment. Thus, if ever in the case of any company the debentures and debenture stock issued by it were in substance identical, this Municipal Trust Company is such a company.

But if the word "debenture" has any technical meaning, still I am satisfied that it is also often popularly and ordinarily used in a wider and more general sense. A bequest of "all my

(1) Simonson on Debentures and Debenture Stock, 2nd ed. p. 6.

JOYCE J. 1908 HERRING, *In re.* MURRAY *v.* HERRING.

debentures" is apt to describe not merely the full amount of the investment, but the debentures which the testator had of every kind, if there were more than one. It also must mean, and clearly in the present position of the authorities would mean, "all my debentures at the time of my death," having regard to s. 24 of the Wills Act; and where, as here, there is no bequest of debenture stock to any one else, and the word "all" is used, as it is, I should have expected to find some words expressly excepting or excluding this debenture stock if it was not intended to pass. But there is nothing express in the will indicating that the testator intended to make any distinction between his B debentures and his C debenture stock. When I say "nothing express," I mean except that the only term used is debentures and not debenture stock. In the popular and wider sense I think that a person who owned a portion of this debenture stock and nothing else in the company might well call himself, and be called by others, a debenture-holder, and might be said to hold debentures of the company. In fact, according to the nomenclature used in this company's own documents, I think we find the word "debenture" used in the wider and generic sense. I have already instanced the case of the warrant for payment of the interest. Preceding the balance-sheet, I find, in large print, "Trustees for the debenture-holders," preceding and describing the names of the two gentlemen who are trustees for the debenture stock-holders under the deed. There were no trustees for the debenture-holders if we are to give the word "debentures" a limited meaning; so that these very holders of the C debenture stock are called debenture-holders by the company itself. Again, if we turn to the annual revenue account of the company, we see an item, "To debenture interest" so much, that item including the interest both on the debentures and the debenture stock, without any distinction being made. Further, I think that, as a matter of general experience, when it is not necessary to be technically accurate and precise, holders of debenture stock are commonly spoken of as debenture-holders, debenture stock is included in the general term "debenture debt," and debentures and debenture stock together are spoken of as debentures.

In the case of *Oakes* v. *Oakes* (1) the marginal note is: "Bequest of all the testator's Great Western Railway shares, and all other the railway shares of which he might be possessed at the time of his decease: Held to pass Great Western Railway shares which he had at the date of his will, and which were afterwards, by a resolution of the company made under the authority of an Act of Parliament, converted into consolidated stock." That is not quite accurate, but the meaning is obvious. The bequest was held to pass not the shares, but the stock into which the shares had been converted.

In *In re Lane* (2) a testator bequeathed all his debentures in a particular railway company. At the date of his will he had ten of the company's debentures of 100*l.* each, bearing interest at 5 per cent. per annum. After the date of the will the debentures became payable. The company was unwilling to renew, but offered the testator the option of converting the debentures into an equivalent amount of permanent debenture stock at $5\frac{1}{2}$ per cent. interest. The case was argued throughout, as it seems to me, as a case of ademption, which in strictness I do not think it was. There is no reference that I see to s. 24 of the Wills Act; and the Vice-Chancellor came to the conclusion that the will was not sufficient to pass the new thing which the testator acquired and which he took in exercise of his option instead of the thing which he had bequeathed by his will. Then he held the new thing to be a substantially different thing from that which the will gave, and that it did not answer the description.

In *Morrice* v. *Aylmer* (3) the testator bequeathed "all such stocks in the public funds, or shares in any railway, of which I may die possessed." He died possessed of stock in a railway, and also of shares in the same railway, not fully paid up. It was held by the Court of Appeal and the House of Lords that the words "shares in any railway" passed the testator's stock in that railway. After reading and re-reading the various judgments in this case of *Morrice* v. *Aylmer* (3), it appears to me that to hold that "debentures" in this bequest meant something different from and something which would not pass the testator's debenture

(1) 9 Hare, 666. (2) 14 Ch. D. 856.
(3) L. R. 7 H. L. 717

JOYCE J. 1908 HERRING, *In re.* MURRAY *v.* HERRING.

stock in this company would be putting a meaning upon the term "debentures" so technical as to be in opposition to the ordinary use of the word. I think it is more consonant with the ordinary language used in such matters to say that "debentures" in the expression "all my debentures" in a certain company, where the debentures are such as they were here, ought to be held to include such debenture stock as this is. Further, though upon this there might well be different opinions, I think that the context—what context there is—in this case rather helps that construction. I think the testator intended by this bequest to dispose of all the debentures and debenture stock, preferred and deferred stock, which he held in this company, and I so decide.

Solicitors: *Beyfus & Beyfus; Broad & Co.; Seaton Taylor & Co.*

G. A. S.

JOYCE J. 1908 *July* 7.

In re CUFFE. FOOKS *v.* CUFFE.

[1906 C. 2014.]

Will—Lapse—Death of all Beneficiaries and Executor before Testator—Administration cum testamento annexo—"Intestate"—Intestates' Estates Act, 1890 (53 & 54 *Vict. c.* 29).

Where there was a complete failure by lapse of all the beneficial interests under a will, and the person named as executor had predeceased the testator, who died leaving a widow, but no issue:—

Held, that the testator had died "intestate" within the meaning of the Intestates' Estates Act, 1890, and that his widow was entitled to 500*l.* out of his estate absolutely and exclusively.

ADJOURNED SUMMONS.

Joseph Cuffe, by his will and a codicil thereto dated in 1872, appointed an executor and bequeathed certain legacies. He died in 1906, leaving his widow, but no issue, him surviving. The executor and all the legatees had predeceased him. Letters of administration with the will and codicil annexed were granted to the plaintiff as attorney of the widow. The net value of the estate exceeded 500*l.*

This originating summons was taken out by the plaintiff for the determination of the question whether the deceased had died "intestate" within the meaning of the Intestates' Estates Act, 1890 (1), so that his widow was entitled absolutely and exclusively to the sum of 500*l.* out of his estate.

By the judgment made upon the summons on July 30, 1906, it was declared that the trusts of the will of the testator ought to be carried into execution, and certain accounts and inquiries were directed to be taken and made.

C. J. Mathew, for the plaintiff.

P. F. S. Stokes, for the widow. The deceased died "intestate" within the Act. The person named as executor and all the beneficiaries having predeceased him, there was a complete failure of the will and a total intestacy. In *In re Twigg's Estate* (2), where some small testamentary provision took effect, Chitty J. held that the Act did not apply. If everything fails except the appointment of the executor it may be doubted whether the Act applies, but if the appointment of the executor fails also, then the Act clearly applies.

In *In re Ford* (3) it was held that the hotchpot provisions of the Statute of Distributions apply to an intestacy occasioned by a will becoming wholly inoperative by the death of the universal legatee and executrix in the lifetime of the testator as well as to an intestacy occasioned by the non-existence of any testamentary instrument.

St. John Clerke, for some of the next of kin. Where the Court has ordered, as here, that the trusts of the will ought to be carried into execution, it is difficult to see how the deceased can be said to have died "intestate." The question of intestacy for the

(1) The Intestates Estates Act, 1890, provides by s. 1 that, "The real and personal estates of every man who shall die intestate after September 1, 1890, leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed 500*l.*, belong to his widow absolutely and exclusively."

Sect. 2 provides, "Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of 500*l.* the widow of such intestate shall be entitled to 500*l.* part thereof absolutely and exclusively . . . ."

(2) [1892] 1 Ch. 579.

(3) [1902] 1 Ch. 218; 2 Ch. 605.

JOYCE J. 1908 CUFFE, *In re.* FOOKS *v.* CUFFE.

purposes of this Act involves different considerations from those which arise under the Statute of Distributions.

In considering this question three different cases present themselves: First, where there is a partial failure of the beneficial interest. That case is covered by the decision in *In re Twigg's Estate.* (1) Secondly, where there is a total failure of the beneficial interest coupled with the appointment and existence of an executor. As to that case, it is clear, according to *Stewart* v. *Stewart* (2), that the executor is a trustee for the persons entitled under the Statute of Distributions. Under the Act of 1890 the widow takes not through, but against the executor. There is no intestacy, therefore, in that case. The third case is where there is a total failure both of beneficial interest and executor. A trust is not affected by the mere failure of the trustee; therefore the implied trust for the next of kin does not fail, and there is no intestacy in this case any more than in the others.

R. Nevill, for the remaining next of kin.

JOYCE J. (after referring to the Act). It has been held by Chitty J. in *In re Twigg's Estate* (1) that the Act does not apply to a case of partial intestacy, but there is not a word in his judgment to suggest that he thought it would not apply to a case like the present, where the testator has died intestate as to the whole of his real and personal estate and his executor has predeceased him. I have to deal with a case where the will has become wholly inoperative. In my opinion Joseph Cuffe died "intestate" within the meaning of the Act, and his widow is entitled to the 500*l.*

Solicitors: *Bernard Arnold; Sheehy.*

(1) [1892] 1 Ch. 579. (2) (1880) 15 Ch. D. 539.

G. A. S.

In re ELEMENTARY EDUCATION ACTS, 1870 AND 1873. JOYCE J.

1908

July 9, 14.

Costs—Taxation—Lands Clauses Act—Sale of Leaseholds—Death of Vendor before Completion—Vendor's Will—Costs of Probate—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 82.

Where an owner of leasehold property entered into a contract under the Lands Clauses Consolidation Act to sell the same to the London County Council, and died before the sale was completed, having by his will left all his property to his wife and appointed her his sole executrix :—

Held, that the costs of taking out probate to the vendor's will did not come within s. 82 of the Act, and were therefore not payable by the county council.

On November 25, 1903, notice to treat under the Lands Clauses Act was served by the School Board for London on Joseph Baxter for his estate and interest in certain leaseholds. Baxter originally claimed 1185*l.* for the property less 75*l.*, the amount of a mortgage debt to which it was subject. After some negotiation, on November 15, 1905, a sealed offer of 1050*l.* was made by the London County Council, in whom the rights and liabilities of the London School Board had then become vested. On November 29, 1905, this offer was accepted by Baxter.

On February 27, 1906, Baxter died, having by his will given all his property, estate, and effects of whatsoever description to his wife absolutely, and appointed her sole executrix.

On March 29, 1906, the widow obtained probate of the will, the net value of the estate being sworn at 1078*l.*

On May 9, 1906, the purchase of the leaseholds was completed, Mrs. Baxter executing an assignment to the council of the equity of redemption in the property. In taxing the costs to be paid by the London County Council the taxing Master allowed the costs of obtaining probate of Baxter's will.

The county council objected to the taxation on the ground that probate was not taken out at their request, but voluntarily by the executrix to enable her to deal with the testator's assets generally; that the executrix was bound to prove before dealing

JOYCE J. 1908 ELEMENTARY EDUCATION ACTS, 1870 AND 1873, *In re.*

with the estate; that under s. 82 of the Lands Clauses Consolidation Act, 1845, the promoters were not bound to pay the costs incurred by the vendor's legal personal representative to qualify her to give a receipt for purchase-money owing to her testator's estate; and that the costs of the probate were due and attributable to the death of Baxter and not to the sale, and should not be allowed against the council as costs of title or conveyance reasonably incident to the sale.

The taxing Master, in his answer to the objections, found as a fact that the probate was taken out at the request of the council to enable Mrs. Baxter to give a receipt for the purchase-money, and this was therefore in his opinion a proceeding with which a purchaser content with a holding title might well have dispensed, but which was necessary to enable the vendor effectually to convey to the purchasers; and consequently the costs were payable by the council under s. 82. He accordingly overruled the objections.

This was a summons by the council to review the taxation by disallowing the costs of probate.

Christopher James, for the London County Council. These costs do not come within s. 82 of the Lands Clauses Act. They are not costs of conveying or assuring land or any outstanding term or interest therein. The widow was bound to prove the will before she could deal with the estate or give a receipt for the purchase-money. The costs of probate were costs necessarily incurred by her in clothing herself with power to do that which, in the absence of such power, she could not have done without rendering herself liable to penalties: *New York Breweries Co.* v. *Attorney-General.* (1) All the cases in which promoters have been held liable to pay costs are either cases under s. 80, to which entirely different considerations apply, or else they are cases where some legal estate is outstanding and administration is taken out for the purpose of getting in that legal estate. The two sections are clearly distinguished in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900. (2) That was a case of getting in an outstanding interest.

(1) [1899] A. C. 62. (2) [1908] 1 Ch. 493.

These costs have been incurred in consequence of the death of the vendor before completion. In such cases the costs of proceedings necessary to complete the conveyance are not thrown upon the promoters: *London and South Western Ry. Co.* v. *Bridger* (1); see also Browne and Theobald's Law of Railways, 3rd ed. p. 208. *In re Liverpool Improvement Act* (2), in which Lord Romilly overruled his previous decision in *In re South Wales Ry. Co.* (3), was a case of getting in an outstanding interest. *In re Lloyd and North London Railway (City Branch) Act*, 1861 (4), was decided on s. 80. There are no words in s. 82 applicable to a case of this sort, where the executrix of a deceased vendor is bound to clothe herself with the legal estate in order to enable her to deal with the testator's estate. Although she might have given a receipt for the purchase-money, the council would not have been bound to pay it until probate: *Newton* v. *Metropolitan Ry. Co.* (5) There is no authority or principle under which the county council is liable to pay these costs.

Crossfield, for the widow. The county council clearly insisted upon probate being taken out. It is admitted that the cases under s. 80 are not authorities upon s. 82. Apart from that it is said that the authorities depend upon there being some outstanding interest which existed at the date of the contract. I submit that it is not material whether the outstanding interest did or did not exist at the date of the contract. I rely upon *In re Liverpool Improvement Act* (2), *In re Eastern Counties and Tilbury Junction Ry. Co.* (6), *In re Nash's Estate* (7), and *In re Lowry's Will.* (8) It is said that the executrix was bound to prove, but she might have renounced without affecting her beneficial interest. If she had paid the estate duty without proving, the beneficial interest would have been in her, and the legal estate would have been outstanding in the President of the Probate Division. The council would then, in order to obtain a conveyance to themselves, have been obliged to get some one to

(1) (1864) 12 W. R. 948.
(2) (1868) L. R. 5 Eq. 282.
(3) (1851) 14 Beav 418.
(4) [1896] 2 Ch. 397.
(5) (1861) 1 Dr. & Sm. 583.
(6) (1855) 26 L. T. (O.S.) 176.
(7) (1855) 4 W. R. 111.
(8) (1872) L. R. 15 Eq. 78.

JOYCE J. 1908 ELEMENTARY EDUCATION ACTS, 1870 AND 1873, *In re.*

take out administration with the will annexed. These are costs of getting in the outstanding legal estate, and as such are payable by the council under s. 82.

[He also referred to Jepson on the Lands Clauses Acts, 2nd ed. pp. 252, 253.]

JOYCE J. In this case, after a contract between a vendor and the county council for the sale of a certain leasehold property, which was, of course, a sale governed by the provisions of the Lands Clauses Consolidation Act, the vendor, the owner of the leasehold, died. It then became necessary to carry out the contract, and, for the purpose of executing the conveyance and receiving the purchase-money, his widow, the sole executrix under his will, took out probate. It is now said that the London County Council, under the provisions of the Lands Clauses Consolidation Act, is bound to pay, not the estate duty—the executrix would not go so far as to say that—but the cost of her taking out probate of the will of the testator, the owner and vendor of this land. Why is the county council liable to pay that? It can only be liable to pay under s. 82 of the Lands Clauses Consolidation Act. That is the section which governs this case, and which prescribes what costs promoters are to pay. They are to pay the costs of the conveyance, and they are to pay the "charges and expenses incurred, on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests," and so on; the latter words of the section do not seem to me to be material. Under which of those headings of costs named in the section do the costs of taking out this probate come? To that question I have not received from counsel any satisfactory answer. To my mind it is perfectly clear, first of all, that they are not costs of the particular conveyance to the purchaser; nor are they costs and expenses of any conveyance or assurance of any outstanding term or interest. Nor do I think that they are costs of deducing, evidencing, or verifying the title to such lands. The only word upon which there might perhaps be some argument is the word "evidencing."

But in my opinion they are not costs of evidencing the title of the vendor within the meaning of that expression in this section. I think they were costs incurred by the executrix of acquiring the power to do what she did and necessary to prevent what she was doing from being illegal under the general law, and subjecting her to penalties under the Acts with reference to estate and other duties. If these costs are costs coming within any head of s. 82, of course the London County Council is bound to pay, and I do not see any use in going into any authorities or decisions of all sorts of peculiar cases. The simple question is, Are these costs such costs as are mentioned in that section? and in my opinion they are not.

This summons therefore succeeds, and the respondents must pay the costs.

Solicitors: *E. Tanner; Crossfield, Cushing & Wheldon.*

G. A. S.

In re JOSEPH.
PAIN *v.* JOSEPH.

[1907 J. 1138.]

Will—Construction—Forfeiture Clause—Legacy—Codicil—Substituted Settled Legacy.

Decision of Eve J., [1908] 1 Ch. 599, reversed on the construction of this particular will and codicil.

APPEAL from the decision of Eve J. (1)

The question raised by this appeal turned entirely upon the construction of the particular wording of this testator's will and second codicil. The facts are given in greater detail in the report of the case in the Court below, but the alleged substitutionary gift made by the second codicil is not fully stated.

By his will of October 14, 1883, the testator bequeathed to each of his three grandchildren, of whom the plaintiff, then Sarah Merton, was one, the sum of 1000*l.*, and after making dispositions

(1) [1908] 1 Ch. 599.

C. A. 1908 JOSEPH, *In re.* PAIN *v.* JOSEPH.

of his residuary estate, under which each of his eight surviving children took a share for life subject to a proviso for forfeiture in case of bankruptcy or alienation, with remainder to their respective children and issue, the testator at the close of his will declared "if any child or grandchild or issue of such grandchild shall marry a person not professing the Jewish faith such child grandchild or other issue shall for the purposes of this my will be deemed to have died in my lifetime under twenty-one and unmarried." There were several other indications in the will that the testator treated marriage in the Jewish faith as an essential condition to the taking of any interest thereunder.

By a second codicil of April 18, 1886, the testator revoked the legacies of 1000*l.* each given to each of his said grandchildren, "and in lieu thereof" he gave "the sum of 1500*l.* to be held on trust for each of them and the children and issue of each of them and I direct that each such sum of 1500*l.* shall be held upon and for such trusts and subject to such provisoes including all provisoes relating to or consequent upon forfeiture and with a similar gift over as are hereinafter declared concerning the legacy of 10,000*l.* in favour of my son Hyam Moses Joseph his children and widow and issue as if the trusts powers and provisoes as to the said sum of 10,000*l.* were herein repeated verbatim as to each of my said last named three grandchildren and as to females with the substitution of a surviving husband in lieu of a surviving wife and as to that life interest to apply to the whole income instead of a moiety." The trusts of this 10,000*l.* were, to pay the income to the son during his life "or until he shall under the proviso contained in my said will have committed or suffered any forfeiture," and from and after his death or forfeiture upon trusts for the son's children or issue and his widow to the extent of a life interest in half the income, with a declaration that "the provisoes as to bankruptcy or alienation contained in his said will" were also to apply to the said sum of 10,000*l.*

By a subsequent codicil the testator confirmed his said will and codicils.

On the death of the testator in 1889 the settled legacy of 1500*l.* so bequeathed in trust for the grandchild Sarah Merton and her issue was set aside and invested and the income paid

to her down to December 28, 1898, when Sarah Merton intermarried with one George William Hacket Pain, a member of the Church of England.

Eve J. decided that the plaintiff by her marriage had forfeited her life interest in this 1500*l.* legacy.

The plaintiff appealed.

P. O. Lawrence, K.C., and *J. Israel*, for the appellant. On the wording of this will and second codicil, the settled legacy of 1500*l.* is not a mere substitutionary gift for the original legacy of 1000*l.* The gift in the codicil is entirely different in character and to different legatees. The forfeiture clause is limited to "the purposes of this my will" and is inapplicable to the codicil: *Henwood* v. *Overend* (1); *In re Fraser*. (2)

[COZENS-HARDY M.R. referred to *Early* v. *Benbow*. (3)]

The substituted legacy when vested would not be liable to forfeiture: *Bonner* v. *Bonner*. (4) The governing principle in all these cases of substituted legacies is whether the gift is a mere substitution; if the conditions of the gift are altered, the rule as to substituted legacies does not apply.

Jessel, K.C., and *J. G. Fawcus*, for the trustee of the will and certain beneficiaries. The clause as to forfeiture in the event of marriage out of the Jewish faith is intended to have universal application. The authorities shew that the Court will regard the will as having been brought up to the date of the last codicil, which unites the new testamentary provisions with the old; therefore no stress can be laid on the absence in this case of the very usual words in the proviso "or any codicil thereto." The absolute gift of 1000*l.* is revoked and a settled gift of 1500*l.* is substituted for it, and the will must be read as if this settled gift were originally in it. This rule of construction is well established: *Leacroft* v. *Maynard* (5); *In re Fraser* (2); *In re Champion* (6); *Mann* v. *Fuller*. (7)

[FARWELL L.J. referred to *In re Boden*. (8)]

(1) (1815) 13 Ves. 383, n.; 1 Mer. 23, 26.
(2) [1904] 1 Ch. 111, 726.
(3) (1846) 2 Coll. 342.
(4) (1807) 13 Ves. 379.
(5) (1791) 3 Bro. C. C. 233.
(6) [1893] 1 Ch. 101.
(7) (1854) Kay, 624.
(8) [1907] 1 Ch. 132, 149.

C. A. 1908 JOSEPH, *In re.* PAIN *v.* JOSEPH.

Here there is a general clause of forfeiture operating upon all persons who do a certain act, and when by the codicil the testator confirms his will he brings that forfeiture clause up to the date of the codicil, so as to include gifts in the codicil, just as if this clause were added again at the end of the codicil. The gift in the codicil is not in fact a gift to different persons; the substituted members of the class mentioned in the codicil are all members of the class mentioned in the forfeiture clause, i.e., children or grandchildren. The rule applies in cases which are not a mere substitution as in *Mann* v. *Fuller*. (1)

COZENS-HARDY M.R., after stating the nature of the appeal and the questions for decision, continued:—On general principles it cannot be doubted that in a simple case of a substituted legacy, the substituted legacy is subject to the same conditions and incidents as the original legacy was subject to; but, so far as I am aware, that doctrine has never been applied, except to a case of a substituted legacy. I am not aware that it has ever been applied to a case where the beneficiaries in a codicil are not identical with the beneficiaries in the will. As long ago as Lord Eldon's time, in *Chatteris* v. *Young* (2), this distinction was plainly laid down. There by the will a sum of 20,000*l.* was given to the testator's daughter. The daughter died, and her father (the testator) made a codicil in these words: "Having, since the date of my said will, lost my daughter Mary Young by death, I do, instead of the legacies bequeathed to her by my said will, which are now lapsed, give and bequeath unto her husband, Robert Young, the sum of 20,000*l.*"—the identical sum given instead of the legacy which had been given to the daughter. The original legacy to the daughter was to be paid "in full and free of the legacy duty," and the question was whether the substituted legacy to the son-in-law was to be paid free of legacy duty. The Lord Chancellor was of opinion that the legacy given to Robert Young by the codicil could not be considered to be given by way of substitution for that given to the wife, but was given as an independent, distinct, and substantive bequest. He therefore affirmed the decision of the Vice-Chancellor and dismissed the

(1) Kay, 624. (2) (1827) 2 Russ. 183.

appeal. There are many other authorities that establish that doctrine. I think the case of *In re Mores' Trust* (1), before Turner V.-C., is a good illustration of the principle. It is almost the converse case to the present. There the Vice-Chancellor says this (2): "There are many cases in which it" (that is, the rule in question) "has not been applied; and I can find no case in which it has been held applicable, except where the original legacy has been absolute or defeasible in the party to whom the additional legacy has been given. To apply the rule in such a case as the present, would be to alter the terms of the disposition, and to convert what is in terms given to Edward Rowe Mores into a gift to him, and, after his death, to his sisters, the petitioners." In that case the legacy was given to Edward Rowe Mores for life, and after his death to his sisters. Afterwards an additional legacy was given by a codicil to Edward Rowe Mores, but the Vice-Chancellor held that the doctrine did not apply.

This is the converse case of an absolute gift to the granddaughter, and in lieu thereof a larger sum given to the granddaughter for life, and then to her children. I know of no principle which can justify the application of the well-settled doctrine about substitution and cumulative legacies, and I know of no case which can justify the application of that doctrine, in a case like this.

But it does not stop there. On the language of this particular will and codicil, I confess it seems to me reasonably plain that the doctrine cannot be applied. In the first place it has been held by Kekewich J. on this very will (and I do not desire to express any opinion as to the correctness of the decision) that this 1000*l.*, if the legacy had not been revoked by the codicil, would not have been affected by this proviso at the end of the will. I call it a "proviso," but more correctly it should be called a "declaration." Kekewich J. held that the declaration had no application to the case of a benefit to which a person was entitled as a vested interest in præsenti. In other words, if the lady was entitled, as she would have been under the will, to have gone to the trustees and said "Pay me the 1000*l.*," no marriage she

(1) (1851) 10 Hare, 171. (2) 10 Hare, 176.

C. A. 1908 JOSEPH, *In re.* PAIN *v.* JOSEPH. Cozens-Hardy M.R.

might have entered into with a Christian after that date would have had any operation on her interest at all. It is therefore a little startling to hear it suggested that a legacy in which she takes only a life interest, and in which other persons take the capital interest, is to be subject to this declaration, which, in substance, is a forfeiture declaration, although the original was not so subject.

But it really does not rest there. The declaration in question is only this. [His Lordship, having read the declaration in the will and the terms of the gift of the 1500*l.* legacy in the codicil as set out above, continued:—] I find nothing in the will which justifies me in making this forfeiture clause apply to anything except interests taken under the will itself, and I find much in the codicil which induces me to hold, if I had any doubt about the former proposition, that this particular clause was never intended to apply to the case of the persons interested in the 1500*l.* legacy. On these grounds, therefore, with great respect to the learned judge, I think his decision is wrong, and that the plaintiff, the granddaughter, is entitled to the arrears of income which I understand are in the hands of the trustees, and, of course, the capital will remain intact.

FARWELL L.J. I am of the same opinion. The rule which Eve J. has relied on in support of his judgment is a rule of construction and not a rule of law. It is adopted by the Court under certain circumstances to aid in arriving at the testator's intention, and, so far as I am aware, it has been confined (although I am not prepared to say it is absolutely impossible to extend it), to questions of amount. Where the amount of the legacy to a legatee has been altered, added to, or diminished by a codicil, and the substituted amount is given to the same person in lieu of or in addition to the original legacy, the bequest made by the codicil is subject to the same conditions and incidents as the original legacy in the hands of the original legatee; because to make what was an original gift to A., subject to conditions affecting A., apply to a gift in lieu thereof to X., or to A. and X., is to my mind inconsistent with the phraseology of the rule of construction, because the legacy given is not the same legacy at all,

nor is it given to the same legatees; and this ground of the respondents' argument is not of any effect and therefore fails.

The second ground argued before us is that the codicils confirm the will; that although the codicil in question does not do so, subsequent codicils do; and the effect is that this clause which I call the forfeiture clause does not expressly confirm it, but merely brings the whole of the testamentary documents down to the date of the latest codicil; and that in arriving at the testator's meaning regard must be had to all the testamentary documents that he has executed down to the date of the latest codicil. But this does not assist the respondents. When all the testamentary documents are considered there is an original gift in the will which, as Kekewich J. has held, was subject to forfeiture in an event which would not be applicable to the present case; a gift in the codicil which is an independent gift, a new gift altogether, so far as the 1500*l.* substituted for the 1000*l.* is concerned; and the only reference to the will in the trusts declared of the 10,000*l.* is the forfeiture clause on bankruptcy or alienation. It is plain, therefore, on reading the documents, that the testator, in dealing with this new gift, refers to one forfeiture clause and one only; and the inference is irresistible that he did so because he did not mean the other to apply; and considering the extraordinarily wide-reaching effect which was pointed out by Kekewich J. on the former occasion, it may well be that the testator thought it better not to insert anything so extravagant. But, however that may be, in my opinion, on the rule of construction applied to this particular will and codicil, the view taken by the learned judge below cannot be supported.

KENNEDY L.J. I agree, for the same reasons.

Solicitors: *Buxton Ashton & Son; Joseph & Hyam.*

W. C. D.

C. A. 1908 *July* 10.

SOUTH EASTERN RAILWAY COMPANY *v.* NATIONAL TELEPHONE COMPANY, LIMITED.

[1907 S. 1107.]

Telegraph—Telephone—Bridge carrying Public Road over Railway—Power to lay Cable along Bridge—Consent of Railway Company—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *s.* 3; *s.* 6, *sub-ss.* 1, 4; *s.* 32—*Telegraph Act*, 1892 (55 & 56 *Vict. c.* 59), *s.* 5.

Appeal from a decision of Warrington J. (1)

By an agreement entered into between the plaintiffs and the defendants in November, 1906, the defendants agreed to pay to the plaintiffs 30*l.* a year for permission to lay and maintain a telephone cable over a bridge crossing the plaintiffs' railway, and in pursuance of this agreement they laid the cable under the footway across the bridge. They subsequently repudiated the agreement on the ground of want of consideration, inasmuch as according to their view of the effect of the Telegraph Acts, 1863 and 1892, they had power to lay the cable over the bridge without permission from the plaintiffs. Thereupon this action was brought for a declaration that the defendants were not entitled to use or maintain any cable over the bridge except upon payment of 30*l.* a year and with the consent of the plaintiffs.

Warrington J., upon the construction of the Telegraph Acts, 1863 and 1892, decided that the defendants were not authorized to construct or maintain the works in question without the consent of the plaintiffs, and that the plaintiffs were entitled to the declaration they claimed.

The defendants appealed.

Roskill, K.C., and *H. H. Gaine*, for the defendants.

H. Terrell, K.C., and *Percy Wheeler*, for the plaintiffs.

The Court (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.) dismissed the appeal on a ground which does not call for a

(1) Ante, p. 50.

detailed report. Their Lordships, without expressing any opinion on the construction of the Telegraph Acts, held that, inasmuch as the defendants had taken the benefit of the agreement with the plaintiffs and had not counter-claimed to have it set aside, it must be treated as good, and so long as that agreement stood the defendants could not repudiate their obligations thereunder.

Solicitors: *W. E. Hart; John W. Watkin.*

H. B. H.

In re NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED.

CLINTON'S CLAIM.

[00232 of 1907.]

Company—Costs—Preliminary Expenses—Registration Fees—Stamp Duty on Capital—Payment by Promoter—Liability of Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 17—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 112—*Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 7.

The mere fact that a promoter pays the registration fees and ad valorem stamp duty on the registration of a company does not in itself entitle him to recover them from the company.

Judgment of Buckley J. in *In re English and Colonial Produce Co.*, [1906] 2 Ch. 435, 439, overruled on this point.

SUMMONS for adjudication on claim.

On December 13, 1905, Harris acquired an option to purchase Hayes' business of motor mail contractor.

On January 2, 1906, the Motor Coach Syndicate, Limited, was incorporated mainly for the purpose of acquiring this option, promoting another company to take it over, and paying the costs preliminary to the formation, registration, and establishment of the syndicate and the company.

On March 16, 1906, the syndicate, having acquired the option, registered the National Motor Mail-Coach Company, Limited, with a capital of 152,500*l.* divided into 150,000 ordinary 1*l.*

C. A. 1908

NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.* CLINTON'S CLAIM.

shares and 50,000 deferred 1*s.* shares, and paid the following necessary preliminary fees and disbursements, namely:—

	£	*s.*	*d.*
Ad valorem duty on statement of capital	381	5	0
Fee stamp on memorandum of association	31	5	0
Deed stamp on ditto	0	10	0
Deed stamp on articles	0	10	0
Fee stamp on ditto	0	5	0
Various other stamps and commissioners' fees, including fees payable to the Board of Trade for consent to use the word "National"	2	7	0
	£416	2	0

The first object of the company stated in its memorandum was to adopt an agreement between the syndicate and the company the draft of which was already prepared and identified. By this agreement, which was sealed by the syndicate on March 19, 1906, the syndicate was to sell the business to the company, and (clause 4) was to pay all expenses of the formation, incorporation, and promotion of the company and of the preparation and issue of the first prospectus of the company, and all preliminary expenses (except underwriting commission and broker's fee) down to the first general allotment of ordinary shares.

Clause 7 provided that unless before April 20, 1906, the company should have become entitled to commence business, either of the parties might by notice in writing determine the agreement, but such determination should not give rise to any claim for compensation expenses or otherwise.

The agreement was, however, never executed or adopted by the company, but the arrangement fell through, and the option determined.

On May 5 and May 23, 1906, special resolutions for the voluntary winding up of the syndicate were passed, and Clinton was appointed liquidator.

A fresh option from Hayes was subsequently obtained by a

new promoter, Webb, who by an agreement of May 22, 1907, agreed to sell the business to the company and (clause 4) to pay all the preliminary expenses of the company down to the first general allotment of shares, or if the directors should resolve not to go to allotment, then down to the date of such resolution, exclusive of underwriting commissions, costs of agreements relating thereto, and brokerage, but inclusive of the costs and expenses incurred in the preparation and execution of the memorandum and articles of association of the company and the registration thereof and all stamp duties and other fees thereon, and in obtaining the incorporation of the company and in or about the promotion of the company and the preparation and issue of the prospectus and advertisements, and (if the directors should resolve not to proceed to allotment) the expenses of returning the amounts paid on application and of winding up the company.

Clause 13 provided that unless before June 15, 1907, at least 35,000 ordinary shares in the company should have been applied for by responsible persons, or unless before June 30, 1907, the company should have become entitled to commence business, either party might by notice in writing annul the sale, and thereupon the agreement should become void save as regards (inter alia) clause 4, and the promoter should not be entitled to any remuneration for his services.

This agreement was sealed by the company, which went to allotment on June 6, 1907, and on the same day obtained a certificate entitling it to commence business.

On June 11, 1907, 2000*l.* was paid to Webb on account of the purchase-money.

The purchase was, however, never completed, and on September 25, 1907, and October 10, 1907, special resolutions for a voluntary winding-up were passed.

On October 30, 1907, a supervision order was made, and Pears was appointed liquidator.

On January 6, 1908, Clinton, the liquidator of the syndicate, sent in a claim for the 416*l.* 2*s.* paid by the syndicate for registration expenses.

The company's liquidator issued this summons to determine

C. A. 1908

NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED. *In re.* CLINTON'S CLAIM.

(inter alia) whether the claim or any part thereof ought to be allowed. The summons was heard before Swinfen Eady J. on May 12, 1908.

Eustace Smith, for the claimant. The company was under a statutory liability to pay the registration fees under s. 17 of the Companies Act, 1862, and the two shillings per cent. ad valorem stamp duty on statement of capital under s. 22 of the Stamp Act, 1891, increased to five shillings per cent. by s. 7 of the Finance Act, 1899. As it has taken the benefit of the syndicate's payment, it is liable to repay the money: *In re English and Colonial Produce Co.* (1) There was no appeal from that part of Buckley J.'s judgment.

[SWINFEN EADY J. The company could not avoid taking the benefit. Suppose A. voluntarily pays B.'s tailor's bill without a previous request, can A. sue B. for money paid to his use?]

No. That would not be a case of statutory liability, but would fall within the general rule requiring a previous request. The case of the payment of a statutory liability at all events in the case of registration expenses was evidently treated by Buckley J. as an exception to the general rule.

The case is somewhat analogous to the voluntary payment of burial expenses, which may be recovered from the party really liable to pay them, although there was no previous request: Chitty on Contracts, 14th ed. p. 48, citing *Ambrose* v. *Kerrison* (2); *Bradshaw* v. *Beard* (3); *Jenkins* v. *Tucker* (4); *Rogers* v. *Price*. (5)

Fischer Williams, for the liquidator of the company. It is well settled that if A. voluntarily pays B.'s debt without a previous request he cannot sue B. for money paid to his use: *Stokes* v. *Lewis* (6); *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*. (7) Of course he could take an assignment of the debt and sue on that. In *In re English and Colonial Produce Co.* (1), which was a reconstruction and not a promotion case, Buckley J. cannot have intended to depart from this general rule, but must have inferred an assumption of liability on the actual facts. In

(1) [1906] 2 Ch. 435, 439.
(2) (1851) 10 C. B. 776.
(3) (1862) 12 C. B. (N.S.) 344.
(4) (1788) 1 H. Bl. 90.
(5) (1829) 3 Y. & J. 28.
(6) (1785) 1 T. R. 20.
(7) (1875) L. R. 2 Ind. Ap. 131, 143.

the present case the promoting agreements are quite inconsistent with any liability for preliminary expenses falling on the company. The burial cases form a special exception to the general rule, based on the proper regard for decency and the comfort of others; but the mere fact that the debt or liability is statutory is surely immaterial.

In the present case the 31*l.* 10*s.* registration fees were a statutory liability of the company under s. 17 of the Companies Act, 1862. But the stamp duty, amounting to 381*l.* 5*s.*, is not expressly imposed on the company by s. 22 of the Stamp Act, 1891, and is not therefore a statutory liability of the company.

Eustace Smith in reply. The stamp duty is impliedly imposed on the company by the Stamp Act, 1891, and is therefore a statutory liability on the same footing as the registration fees. The stamp duty must have been included in the 33*l.* 12*s.* 6*d.* referred to in Buckley J.'s judgment, as, after referring to s. 17 of the Companies Act, 1862, he says (1), "Under that section and a subsequent Act of Parliament the company became liable to pay the fees on its registration amounting to 33*l.* 12*s.* 6*d.*" The "subsequent Act of Parliament" is evidently the Stamp Act, 1891. Both fees and stamp duty are therefore covered by the judgment. (2)

SWINFEN EADY J., after stating the facts and pointing out that in the case both of the abortive and the effective promotion there was a manifest intention that the costs of formation and registration should fall on the promoter and not on the company, continued:—The company is now in liquidation, and the claimant, the liquidator of the promoting syndicate, seeks to prove for the 416*l.* 2*s.* paid for fees and stamp duty on registration. He contends that the company was under a statutory obligation to pay the registration fees under s. 17 of the Companies Act, 1862, which provides that "The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint stock companies hereinafter

(1) [1906] 2 Ch. 439.

(2) Messrs. Dyson & Co. have kindly referred to their papers and find that the 33*l.* 12*s.* 6*d.* included the ad valorem duty on the capital, which was 10,000*l.*

C. A. 1908 — NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.* — CLINTON'S CLAIM. — Swinfen Eady J.

mentioned, who shall retain and register the same: There shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked B in the First Schedule hereto, the several fees therein specified . . . ."

The fees under table B in the present case amount to 31*l.* 10*s.* The larger amount of 381*l.* 5*s.* is not imposed by s. 17 of the Companies Act, 1862, at all. It is imposed by s. 112 of the Stamp Act, 1891, which provides that "A statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the registrar . . . . and every such statement shall be charged with an ad valorem stamp duty of two shillings for every one hundred pounds . . . . of the amount of such capital . . . ." This duty was increased to five shillings per one hundred pounds by s. 7 of the Finance Act, 1899. Although the duty is imposed by these statutes, it is not in express terms imposed on the company, and there is no enactment that it is to be paid by the company. The duty must obviously be paid, and the promoter or other person seeking to register a company is obliged to provide for the duty, as otherwise the company will not be registered.

The claimant now seeks to make the company liable for these expenses, contending that it was under a statutory liability to pay them, and submitting as a broad principle of law that whenever a person is under a statutory liability to pay a sum of money a third person may voluntarily pay the money and then sue the party who was really liable to pay it for money paid to his use. There is no foundation for any such general proposition. Indeed the contrary is well settled. If A. voluntarily pays B.'s debt, B. is under no obligation to repay A. There must be a previous request, express or implied, to raise such an obligation, and in this respect I can see no difference between the discharge of a statutory liability and the discharge of a contractual liability. The burial cases depend on other considerations and form an exception to the general rule.

It is contended that the payment of the registration fees and duties on the formation of a company forms another exception,

that the company has taken the benefit, and that the point is covered by *In re English and Colonial Produce Co.* (1) But the judgments of the Court of Appeal are adverse to that view. Romer L.J. says (2): "In my opinion, with respect to a solicitor's claim for costs for work done by him in relation to the formation of a company which is subsequently formed, in order to substantiate a claim against the new company for his costs as solicitor he must establish a legal claim against the company either on his own behalf or on behalf of some person or persons in whose shoes he is entitled to stand. If he cannot do that he cannot succeed, in my opinion, in establishing a claim on what are called equitable grounds. The idea that a company merely because it has obtained the advantage of the solicitor's work done before the formation of the company is liable in equity for the costs of that work appears to me to be wholly untenable. In my opinion there is no such equity, and any claim based upon it ought to fail."

It is contended, however, that the judgment of Buckley J. in the Court below at all events covers the registration fees which the company was under a statutory liability to pay. In *In re English and Colonial Produce Co.* (1) the solicitors had paid the registration fees, and Buckley J. thought they were entitled to charge the company in respect of that item. This part of his judgment was not appealed. I think, however, that the opinion of Buckley J. had reference to the particular facts of that case, and that he did not intend to lay down a general rule that any one paying the registration fees of a company could recover them from the company. If this were the law, many difficulties might arise. Suppose the promoters agree to pay the registration fees. Is the company nevertheless liable to pay the solicitors although the solicitors register the company and pay the fees at the request of the promoters by whom as between themselves and the company the fees are payable?

The general proposition of law propounded by the claimant is wholly unsound, and the claim must be dismissed with costs.

(1) [1906] 2 Ch. 435. (2) [1906] 2 Ch. 442.

G. R. A.

C. A. 1908

NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.* CLINTON'S CLAIM.

The claimant appealed. The appeal was heard on July 10, 1908.

Eustace Smith, for the appellant, repeated the arguments urged in the Court below, and contended, further, that there had been an adoption or ratification by the company of the acts of the syndicate.

Fischer Williams, for the respondent, was not called upon.

COZENS-HARDY M.R. This is an appeal from an order of Swinfen Eady J. disallowing a claim made by the liquidator of the Motor Coach Syndicate, which paid the fees payable on the incorporation of the National Motor Mail-Coach Company, which is also in liquidation. Swinfen Eady J. has held that the claim is not maintainable, on the ground that the payment of these fees was not a payment made on any request of the company and was consequently a payment in respect of which no liability on the part of the company could be established. The appeal is based on two grounds. In the first place, it is said that Buckley J., as he then was, in *In re English and Colonial Produce Co.* (1), held that, although the solicitors in that case ought not to be allowed to recover the expenses which they had paid out of pocket of preparing the memorandum and articles of association of the company, yet they were entitled to recover sums paid to the Registrar of Joint Stock Companies on registering the company. The learned judge treated that payment as standing on a different footing from all other payments, and he based his judgment on s. 17 of the Companies Act, 1862. He says (2): "The fee of 33*l.* 12*s.* 6*d.* paid by the solicitors to the Registrar of Joint Stock Companies on registering the company stands on a different footing. By s. 17 of the Companies Act, 1862, the memorandum and articles are to be delivered to the Registrar of Joint Stock Companies, and there shall be paid to the registrar by a company having a capital divided into shares—and the Produce Company was such a company—certain fees. Under that section and a subsequent Act of Parliament the company became liable to pay the fees on its registration amounting to 33*l.* 12*s.* 6*d.*

(1) [1906] 2 Ch. 435. (2) [1906] 2 Ch. 439.

The solicitors paid that sum, which the company was under a statutory liability to pay to the revenue authorities, and the solicitors were in my judgment entitled to charge the company in respect of this item." I should mention that the claim made by the solicitors was for a much larger amount, as to which there was an appeal to the Appeal Court, who affirmed Buckley J. in disallowing the claim, but there was no appeal as to this small item. I need hardly say that any opinion expressed by Buckley J., especially upon this branch of the law, deserves the greatest respect, but I cannot concur in the view which he took, and Mr. Eustace Smith confessed that he had not been able to find any other authority differentiating between a statutory liability and any other liability in relation to this question. There is no other ground upon which the judgment can be supported, and I know of no principle or authority on which that distinction can be maintained.

In my opinion Swinfen Eady J. was quite right when he said: "There is no foundation for any such general proposition. Indeed the contrary is well settled. If A. voluntarily pays B.'s debt, B. is under no obligation to repay A. There must be a previous request, express or implied, to raise such an obligation, and in this respect I can see no difference between the discharge of a statutory liability and the discharge of a contractual liability." Therefore, on the mere point of statutory liability, I think that his decision was perfectly correct. But then it is said that there was some ratification of an act done by the syndicate as agents for the company. I am unable to follow that. It is apparent on the face of the documents that, as between the promoters and the company, this payment was to be made not by the company, but by the promoters; and to contend that when the syndicate undertook to pay there could exist any implied request by the company to the syndicate to pay on the terms that the company would recoup them is to ask the Court to imply what is contrary to the express bargain. Then it is said that, the first promotion having fallen through, another promotion agreement was entered into whereby Webb undertook to pay the preliminary expenses, including the registration fees; but that, in my opinion, cannot amount to a ratification of a payment made by the syndicate, not as

C. A. 1908 — NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.* CLINTON'S CLAIM.

agents of the company, but under circumstances which negative any such implication. On whichever ground the appeal is based, in my opinion the judgment of Swinfen Eady J. is right, and the appeal must be dismissed with costs.

FARWELL L.J. I so entirely agree with what has fallen from the Master of the Rolls that I should not add anything were it not that we are overruling the decision of my brother Buckley in *In re English and Colonial Produce Co.* (1) I confess I am unable to follow that judgment. The articles of association in that case (article 109) provided that the business of the company should be managed by the directors, who might pay all such expenses of and preliminary and incidental to the promotion, formation, establishment and registration of the company as they thought fit. A bill of costs was sent in by a firm of solicitors against the company for preliminary expenses, including the fees paid on registration. The registrar disallowed all the items, and in answer to an objection to taxation founded upon article 109, said: "The costs in question appear to have been authorized by certain persons who afterwards joined the board of the company; but though the company had power to pay, they never took any steps to pass any resolution to that effect. The company are therefore not liable to pay the costs of the registration of the company." That was overruled by Buckley J. in the passage which has been already read by the Master of the Rolls. The learned judge, in overruling the registrar, has really determined that, where a company is directed by statute to pay a sum of money, any person who makes that payment must be taken to have made it at the request of the company and is entitled to be recouped on that footing. That seems to me to be contrary to a long line of authorities. I do not think that the law can be better stated than it was by Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (2), where he says: "It is perfectly true that the inference of an understanding between the parties—which you may translate into other language by calling it an implied contract—is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of

(1) [1906] 2 Ch. 435. (2) (1886) 34 Ch. D. 234, 249.

the saved property knew that the other party was laying out his money in the expectation of being repaid. In other words, you must have circumstances from which the proper inference is that there was a request to perform the service." Stopping there, the inference from the facts of the present case was all the other way. So far as the company could be said to know anything, it knew that the contract was with the promoters. The Lord Justice then deals with the question of ratification; he says: "There is nothing more vague than the way in which the word 'adoption' is used in arguments at law, and sometimes ambiguous language used about adoption is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on your behalf in such a sense as to make you liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. Ratification only takes effect in law from its being equivalent to a previous authority, and a previous authority is an incident which only arises in the relation of principal and agent. There have been many attempts to make people liable by what is called adoption of a contract, or of some other act which never purported to be made or done on their behalf, and such attempts have failed. I may instance as a leading type of that class of cases the attempts that have been made of late to make companies liable for contracts entered into by promoters." The result is that upon the question of law I entirely agree with Swinfen Eady J. that no request can be implied in this case, and as regards ratification, on the facts of this case, there is nothing that can be called either adoption or ratification at all. The company, so far as it exercised any option, determined that the payment should be made by other people.

KENNEDY L.J. I am of the same opinion. It seems to me that there is nothing in the facts of this case which makes it a stronger case than the case before my brother Buckley. We have therefore to consider whether or not we can adopt the view expressed by him that the payment of these registration fees

C. A. 1908 — NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED, *In re.* — CLINTON'S CLAIM. — Kennedy L.J.

is one in respect of which the promoters are entitled to be recouped. I cannot find in the report of that case any particular facts which differentiate it from the present case. I need not say that any case in which Buckley L.J. has expressed an opinion, and particularly an opinion in relation to the law of Companies, is one which I should be slow to differ from. But having carefully considered his judgment, I cannot think that it can be supported by any satisfactory legal reasoning. It is impossible, in my opinion, to differentiate a payment made by a person without request in case of a statutory obligation from a similar payment in case of any other legal obligation, and it is certainly not the law that a person can recover money paid by him because the person on whose behalf it was paid was under a legal obligation to pay.

Solicitors: *Farman & King: Peters & Bolton.*

H. B. H.

C. A. 1908 — NEVILLE J. *April* 29, 30; *May* 1, 4. — C. A. *July* 7, 8, 9, 21.

PRICE'S PATENT CANDLE COMPANY, LIMITED *v.* LONDON COUNTY COUNCIL.

[1907 P. 2587.]

London—Main Drainage System—Sewers—Storm-water Overflow—Discharge into Tidal Navigable Creek—Riparian Owners—Interference with private Rights—Trespass—Nuisance—Injunction—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 150, 151—*Metropolis Management Amendment Act*, 1858 (21 & 22 *Vict. c.* 104), *ss.* 1, 2, 23, 24, 31.

The plaintiff company owned large manufacturing works on both sides of a navigable tidal creek forming part of the Thames within the metropolis, and also the bed and banks of the creek subject to the public right of navigation therein. By the Metropolis Management Act, 1855, a brook which discharged into the creek and which had become an open sewer was with other sewers vested in the Metropolitan Board of Works, the predecessors in title of the defendants, with power to alter, divert, or discontinue such sewers when necessary. By that Act and the Metropolis Management Amendment Act, 1858, the board were authorized and required to construct, according to such plans as should to them seem proper, all necessary sewers and works for the improvement of the main drainage of the metropolis and for preventing as far as practicable the sewage of the metropolis from passing into the river within the metropolis; but they were to cause the authorized works to be constructed and kept, and to exercise their powers of disposing of the sewage, so as not to create a nuisance. Under these Acts a vast system of sewers

was constructed so as to carry the sewage down the Thames beyond the limits of the metropolis, and the brook in question was culverted and connected with a low level sewer so that it no longer discharged into the creek. In 1907 the defendants, as part of the main drainage system and to relieve the pressure in the low level sewer in times of heavy rains, erected a pumping station at the mouth of the creek, and when occasion required pumped the storm overflow into the creek. The storm-water was heavily charged with sewage matter, which adhered to the banks of the creek and created a nuisance :—

Held, that the defendants could not justify their acts on the plea that they were carrying out their statutory obligations, and that the plaintiffs were entitled to an injunction both on the ground of nuisance and (Kennedy L.J. doubting) on the ground of trespass.

Dixon v. *Metropolitan Board of Works*, (1881) 7 Q. B. D. 418, distinguished.

ACTION.

The plaintiffs were the owners and occupiers of a considerable area of land at Battersea, on the south side of the river Thames. This land was situate on both sides of and fronted a tidal navigable creek of the Thames, called Battersea Creek. On the land the plaintiffs had built extensive factories where they carried on their business. The plaintiffs also claimed (but the defendants did not admit) that they were entitled to the foreshore and bed of the creek under a grant from the Crown in the reign of Charles II. to one of their predecessors in title. They had embanked the foreshore of the creek and had constructed wharves thereon, alongside of which they loaded and unloaded their barges for the purposes of their business. They also berthed their barges in the creek, and drew water from it for their business.

Battersea Creek originally formed the natural outlet to the Thames of a stream called the Falcon Brook, which drained an area of land to the east and south-east of the creek ; but by the year 1855 the Falcon Brook had become an open sewer. By s. 135 of the Metropolis Management Act, 1855, the Falcon Brook was vested in the Metropolitan Board of Works as one of the main sewers of the metropolis, and under the powers of that Act and of the Metropolis Management Amendment Act, 1858, the board about the year 1865 covered in and culverted the Falcon Brook and connected it, at a point near the head of the creek, with their southern low level sewer as part of the main

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

drainage system of the metropolis, and so that it no longer discharged into the creek but passed into the low level sewer, which had its outfall at Crossness, near the mouth of the Thames. At the same time an opening or means of discharge from the low level sewer into the creek was made at the point of connection. This opening was controlled by a penstock, which was usually kept closed, but occasionally some sewage passed from it at low tide by means of a pipe into the creek.

Under and by virtue of the Local Government Act, 1888, the powers, duties, and liabilities of the board in relation to the main drainage of the metropolis became vested in the defendant council; and in July, 1907, the defendant council erected a pumping station at the head of the creek as a storm-water outlet to relieve the pressure in the low level sewer in times of heavy rainfall, and during August, September, and October, 1907, pumped large quantities of storm-water into the creek.

The plaintiffs commenced this action in November, 1907, and by their statement of claim alleged (amongst other things) that the storm-water discharged by means of the aforesaid pumping station into Battersea Creek was in fact unpurified sewage effluent in a dilute state and contained foul and noxious matter in large quantities and was highly offensive to the senses and dangerous to health; that the aforesaid discharge of storm-water constituted a continuing legal trespass upon such parts of the bed and bank of the creek as were owned by the plaintiffs; that the aforesaid acts of the defendant council constituted an intolerable dangerous and increasing nuisance to the plaintiffs, and were in fact in direct breach of the defendant council's obligations under s. 135 of the Metropolis Management Act, 1855; and the plaintiffs claimed an injunction to restrain the defendant council from pumping or discharging into or through Battersea Creek any storm-water, dilute sewage, or other artificial discharge so as to cause a nuisance to the plaintiffs, or so as to interfere with their rights of navigation, mooring, or berthing, or so as to render the water of the creek unfit for use in the plaintiffs' works, or so as to damage the banks and bed of the creek occupied by the plaintiffs as aforesaid, or infringe their rights therein as riparian proprietors.

The defendant council by their defence traversed the allegations of the plaintiffs and set up that the pumping station was part of the main drainage scheme of the metropolis and was erected by them in the performance of their statutory duties and under the powers and provisions of the Metropolis Management Acts, 1855 and 1858; and they alleged that the said main drainage scheme did not provide and that there did not exist a separate system of disposing of rain or surface water as distinct from sewage, and that the cost of providing such a separate system would be so enormous as to be practically impossible; that at times of heavy rain it was necessary to relieve the main and intercepting sewers by means of overflow or storm outlets into the Thames, through which, when the storm-water in the sewers reached a certain height, it was discharged by gravitation or by pumping into the Thames; and that the said pumping station had been properly and efficiently constructed, and pumping operations had never been and were not intended to be resorted to except when there was danger of flooding to the low-lying districts of the neighbourhood, and such operations had always been conducted properly and without negligence on their part and only when the storm-water in the main sewers had risen to the height which indicated the existence of such danger. They further alleged that, acting under their statutory powers and exercising after due consideration their discretion as to the nature and extent of the works necessary and proper to be executed for the purpose of providing for the effectual sewerage and drainage of the metropolis, and in particular for the disposal of storm-water and the prevention of flooding at times of heavy rainfall, they had adopted the system of storm-water outlets into the river Thames as being the best and most reasonable in the circumstances, and they submitted that they were entitled to use the said pumping station and the sewers and works connected therewith as part of their main drainage system, and to discharge storm-water therefrom into Battersea Creek.

The action came on for trial before Neville J. on April 29, 1908, and the defendant council, whilst not admitting the title of the plaintiffs to the bed and foreshore of the creek, conceded that the plaintiffs were sufficiently in the use and occupation of

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

them to maintain the action. The result of the evidence sufficiently appears in the arguments and judgment. The issues raised turned mainly on the provisions of the said Acts of 1855 and 1858. (1)

(1) The Metropolis Management Act, 1855, enacts:—

Sect. 135: "The sewers mentioned in Schedule D to this Act" (including the Falcon Brook), "being the main sewers now vested in the Commissioners of Sewers of the City of London and in the Metropolitan Commissioners of Sewers respectively, with the walls, defences, banks, outlets, sluices, flaps, penstocks, gullies, grates, works, and things thereunto belonging, and the materials thereof, with all rights of way and passage used and enjoyed by such commissioners respectively over and to such sewers, works, and things, and all other rights concerning or incident to such sewers, works, and things, shall be vested in the Metropolitan Board of Works, and such board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis . . . . and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this Act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis . . . . and for the purposes aforesaid such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike road, or any street . . . . as well beyond as within the limits of the metropolis . . . . and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby as hereinafter provided, and all sewers and works from time to time made by the said board shall vest in them; and the said board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause the sewage and refuse from such sewers to be sold or disposed of as they may see fit, but so as not to create a nuisance, and the money arising thereby shall be applied towards defraying the expenses of such board."

The Metropolis Management Amendment Act, 1858:—

Sect. 1: "The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the river Thames within the metropolis."

Sect. 2: "The Metropolitan Board of Works, for the purposes of this Act, may construct any work

Upjohn, K.C., *Jenkins*, K.C., and *Sargant*, for the plaintiffs. The plaintiffs are in the position of riparian proprietors, and, on the evidence, the discharge of storm-water into the creek is a serious nuisance. The defendants have no right to interfere with the plaintiffs' right of access to or user of the creek, or to pollute the water which the plaintiffs draw from the creek for the purpose of their business, or to inflict this nuisance upon them. The defendants seek to justify their acts under the Acts of 1855 and 1858, but those Acts clearly impose upon them the obligation to act in such a manner as not to create a nuisance, and the works they are to construct are to be worked so as to prevent the sewage of the metropolis from falling into the Thames within the limits of the metropolis; and there is nothing in either Act which empowers them in carrying out their works to do anything to interfere with private rights, except in manner pointed out by s. 135 of the Act of 1855 and s. 2 of the Act of 1858, and for that purpose ss. 150 and 151 of the Act of 1855 give them power to acquire land compulsorily. They are also to dispose of the sewage so as not to commit a nuisance. It is true that s. 31 of the Act of 1858 gives a remedy if a nuisance is committed, but that does not prevent the plaintiffs from bringing this action. What the defendants, therefore, are doing is in breach of their statutory duty and entitles the plaintiffs to an injunction, and it is no answer to say that it is a case of necessity: *Metropolitan Asylum District* v. *Hill* (1); *Attorney-General* v. *Birmingham*

---

through, along, over, or under the bed and soil and banks and shores of the river Thames, making compensation to all persons having any interest in any wharfs, jetties, or other property damaged by such works, as provided by the said Act 18 & 19 Vict. c. 120 in respect of property injured under the powers of such Act."

Sects. 3 and 23 empowered the board to construct works to deodorize sewage and to defray the expenses thereof as under 18 & 19 Vict. c. 120.

Sect. 24: "The said Metropolitan Board shall cause all works to be executed under this Act to be constructed and kept so as not to be a nuisance, and shall, in deodorizing any sewage, and in disposing of any sewage or refuse from sewers, act in such manner as not to create a nuisance."

Sect. 31 empowers the Secretary of State, on complaint made to him of any nuisance committed in the execution of any works, or in deodorizing any sewage, or in disposing of any sewage or any refuse from sewers, to direct a prosecution.

(1) (1881) 6 App. Cas. 193, 208.

C. A. 1908

PRICE S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Corporation (1); *Attorney-General* v. *Metropolitan Board of Works* (2); *Islington Vestry* v. *Hornsey Urban Council* (3); *Cator* v. *Lewisham Board of Works* (4); *Attorney-General* v. *Hackney Local Board* (5); *Vernon* v. *Vestry of St. James, Westminster.* (6) The defendants may rely on *Dixon* v. *Metropolitan Board of Works* (7), but it is really not in point, because the sewer there was held not to be a nuisance, and, moreover, it was decided before *London, Brighton, and South Coast Ry. Co.* v. *Truman* (8), where Lord Halsbury points out that the analogy of the cases under Railway Acts does not apply to a case of this kind.

Cripps, K.C., *Peterson, K.C.*, and *Attwater*, for the defendants. Storm-water outlets exist in large numbers on both sides of the Thames, and they are not only absolutely necessary, but any interference with them means an interference and alteration of the whole main drainage system of the metropolis at a cost of upwards of sixty millions. We admit we are not entitled to trespass or to cause a nuisance, and we do not dispute the principle laid down in the cases cited; but the question is whether we are acting within our statutory rights, and, if so, whether we are exercising those rights reasonably and without negligence. We do not admit that the analogy of the railway cases does not apply. Under the Acts of 1855 and 1858 the drainage scheme was to take the sewage of the metropolis north of the Thames to an outfall at Barking and south of the Thames to an outfall at Crossness, where it is deodorized. By s. 136 of the Act of 1855 the plans of the board had to be approved by the Commissioners of Works, but that section is repealed by the Act of 1858, and s. 2 of the latter Act gave the board a free hand to do what they thought fit for the main drainage of the metropolis, and they constructed the system now in existence. When the Falcon Brook was connected with the low level sewer in 1865, that necessitated some provision for storm-water at that place, and the penstock was made for that purpose; and the plaintiffs must have known since 1865

(1) (1858) 4 K. & J. 528, 543.
(2) (1863) 9 L. T. 139; 27 J. P. 597.
(3) [1900] 1 Ch. 695, 707.
(4) (1864) 5 B. & S. 115.
(5) (1875) L. R. 20 Eq. 626, 631.
(6) (1880) 16 Ch. D. 449, 466.
(7) 7 Q. B. D. 418.
(8) (1885) 11 App. Cas. 45.

that the Falcon Brook was liable to become a storm-water outlet, which is a necessary element of our drainage system. Sect. 135 of the Act of 1855 and ss. 2 and 24 of the Act of 1858 are carefully limited to nuisances caused by the construction of sewers and to the disposal and deodorizing of the sewage at the outfall at Crossness, and do not touch the question of storm-water outlets and any nuisance arising from them. We admit that storm-water overflow is a nasty thing, but this system of storm-water outlets has been going on for forty years, and this pumping station was erected under the Act of 1858. The distinction between a nuisance caused by the exercise of statutory powers without negligence and a nuisance which arises from other causes is pointed out in *Attorney-General* v. *Metropolitan Board of Works*. (1) If the plaintiffs are right, all our storm-water outlets can be attacked, but we submit that we have acted reasonably and within our statutory rights and are protected, and that the plaintiffs' remedy for any damage is compensation as provided by the Acts: *Dixon* v. *Metropolitan Board of Works* (2); *Stroud* v. *Wandsworth District Board of Works*. (3) [They also referred to the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix.), ss. 18, 40, 42; the Rivers Pollution Act, 1876 (39 & 40 Vict. c. 75), s. 18; and the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), ss. 3, 224.]

Cur. adv. vult.

May 4. NEVILLE J. In this case I have come to the conclusion that the defendant council are not entitled to continue the acts complained of by the plaintiffs, and that an injunction must be granted restraining them from so doing. The council are the drainage authority for the metropolis by virtue of the statutory powers given to the Metropolitan Board of Works in 1855 and 1858, which powers are now vested in the council. It seems to me that the real question which has to be decided in the present case is, What is the extent of their powers as such authority as aforesaid? I need hardly say that in the remarks which I make in delivering judgment I am not in the least losing

(1) 9 L. T. 139; 27 J. P. 597.
(2) 7 Q. B. D. 418.
(3) [1894] 1 Q. B. 64; [1894] 2 Q. B. 1.

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Neville J.

sight of the onerous nature of the obligation which is placed upon the council and the extreme difficulty which they must have in carrying out their drainage to the satisfaction of those whose interests are their concern. It may be that if the view of the statutes which I take is right it will be impossible or very difficult for them effectively to drain and maintain the drainage of the metropolis without further statutory powers; and in such a case there is little doubt that the Legislature would grant them further powers, but would grant them, no doubt, subject to compensation for those private rights which may be interfered with by the action of the council, following the course which legislation in this country has, I think I may say, invariably taken, and which, of course, is necessary for the preservation of a society which is founded upon the rights of private owners. In 1855 and in 1858 two statutes were passed which were primarily for the purpose of enabling the drainage authority to prevent so far as possible the pollution of the river Thames with the sewage of the population in or near to the metropolis, and by s. 135 of the first Act they were given wide powers. First of all, all the existing sewers and powers were vested in the Metropolitan Board of Works, with the rights attaching to them, and, secondly, they were given power to make and maintain the sewers for the purpose of, in whole or in part, diverting the sewage from the river Thames; and, for the purpose of the execution of the trust imposed upon them, they were entitled to enter upon the lands of private individuals for the purpose of carrying any such sewers or works as they were authorized to make into, through, or under any lands whatsoever within or beyond the limits of the metropolis. That was followed by these words, "making compensation for any damage done as hereinafter provided." Then follows a prohibition against the drainage authority: "And the said board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied," and so on. Then they are given powers to construct "reservoirs, sluices, engines, and other works as may be necessary, and may cause the sewage and

refuse from such sewers to be sold or disposed of as they may see fit, but so as not to create a nuisance," and the money arising from this sale is to be disposed of in a particular way. Then, perhaps, I ought to refer to the Act of 1858, which authorized the board to commence sewage works as soon as may be, and gave them power to construct works on the shores and banks of the Thames. Sect. 24 provides: "The said Metropolitan Board shall cause all works to be executed under this Act to be constructed and kept so as not to be a nuisance, and shall, in deodorizing any sewage, and in disposing of any sewage or refuse from sewers, act in such manner as not to create a nuisance." Now what has been done here is this. The council are in possession of certain sewers for the draining of the south of London, including Battersea, and they have erected a pumping station near the plaintiffs' works from which they pump storm-water into Battersea Creek, on either side of which the works of the plaintiffs are built. The nature of the storm-water is described by the witnesses. It appears that without great expense at the outset, and certainly without enormous expense at the present time, a double system of drainage in which the storm-water should be separated from the sewage could not be constructed; and the drainage of the metropolis has always been on a single sewer system, by which both the sewage from the houses and the storm-water, when it rains, are carried away. Owing to the necessities of the case in the first instance, and to the large increase of population and the increased burden placed upon the sewers, the whole of the storm-water in many cases cannot be run off to the outlets lower down the river appurtenant to the drainage system, and consequently storm overflows—with pumping stations—have been erected in various parts of the metropolis. In case of rain, as soon as the sewers are full, the pumps at the pumping station are set to work, and what is contained in the sewers is pumped out, amongst other places, into this Battersea Creek. Now what is contained in the sewers at the time when the pumping begins of course must vary from time to time according to the particular circumstances of the case. If the drainage system were ample enough to carry off the first

C. A 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Neville J.

rush of water resulting from a rain-storm, no doubt what the sewers contained would be sewage in a very dilute state, but how dilute the sewage may be must of course depend not only upon the quantity of the rain which falls, but the rapidity with which it falls. It was stated by one of the defendants' witnesses that the effect of storm-water is to dislodge the soil deposited in the local drains and to flush it into the main sewers, and consequently in many cases, when the pumps are set to work, a very large quantity of sewage must be in the sewers. Under such circumstances one is not surprised to find that on many occasions the result of setting the pumps to work has been to discharge water or fluid of such a character into the Battersea Creek as to create a nuisance, and the evidence which has been called by the plaintiffs has been quite sufficient to satisfy me that the result is to cause a serious and even a dangerous nuisance to the plaintiffs. That being so, one has to see, in the first place, whether the council are justified by the terms of their Acts in creating such a nuisance or not. It seems to me curious that the Acts relied upon as enabling the council to create this nuisance are Acts which, as I read them, expressly prohibit the creation of a nuisance in the exercise of the powers given by the Acts. In my opinion what the defendants are doing is a disposal of the sewage within the Acts. It is quite true that it is not the permanent and ultimate disposal of the sewage, but it seems to me that it makes no difference whether it is temporary and partial or whether it is continuous and complete. In either case it is a disposal of the sewage rendered necessary, as the council say, and, for all I know, say with perfect truth, by the conditions of the drainage system which they have in their hands; but of course, in the present case, saying that what they do is necessary is equivalent to saying that it is necessary for them to create a nuisance, and, as I understand it, they are expressly prohibited from creating a nuisance by the Acts. I do not think that they can rely upon a case of necessity here any more than in *Metropolitan Asylum District* v. *Hill*. (1) But I think that the case may be decided upon another point, and that is that

(1) 6 App. Cas. 193.

under the terms of the Acts the council are not entitled to discharge their sewage in infringement of the rights of private owners at all. I can find nothing in the Acts which gives them any such power, except in cases where a power existed at the time when the existing sewers were vested in them. No doubt there were existing rights of discharging sewage into the river Thames which were vested in the predecessors of the council, the Metropolitan Board of Works; but I think that no new right to discharge sewage upon the lands of a private individual was given at all by the Acts. When I say "discharge upon the lands of a private individual" I take it that a discharge which interferes with the rights of a private individual stands on precisely the same footing. The question is one of construction, and the authorities which have been cited do not afford much assistance; but I think that the conclusion at which I am arriving on the construction of the statutes is identical really with the construction which was put upon words in a similar Act by Page Wood V.-C. in *Attorney-General* v. *Birmingham Corporation*. (1) The question upon this point is whether the powers enumerated in s. 135 of the Act of 1855 and s. 2 of the Act of 1858 do include what is being done at the present time. Having carefully considered the various powers given to the predecessors of the council in those two sections, I do not think that what is being done at the present time is justified. If it were, of course then the question would be one, not of action here, but of compensation under the Acts, because compensation is given in every case where powers are bestowed; but it appears to me that the disposal of the sewage complained of is a trespass. Before I part with the case I think I ought to mention the case of *Dixon* v. *Metropolitan Board of Works* (2), in which Lord Coleridge held that a particular act of the Metropolitan Board of Works was not to be restrained by injunction. It was not there contended that what was done was not within their powers, but the question was whether what was done was done negligently; and the only point which Lord Coleridge decided was whether what was done amounted to a nuisance

(1) 4 K. & J. 528. (2) 7 Q. B. D. 418.

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Neville J

within the meaning of the Act of 1855, because he thought that, if it did amount to a nuisance within the meaning of that Act, they could not do it, but if it did not, then the only question was whether there was negligence in the exercise of their powers. He held—and what I have said in the present case I think in no way conflicts with that—that the particular act done by the Metropolitan Board of Works in that case was not within the prohibition against nuisance contained in the Act. I think, therefore, that an injunction must be granted against the defendants, and that the defendants must pay the costs of the action, and there must be an inquiry as to damages.

H. L. F.

C. A.

The defendants appealed. Upon the appeal the plaintiffs established their title to the foreshore and bed of the creek. The appeal was heard on July 7, 8, and 9, 1908.

Cripps, K.C., *Peterson, K.C.*, and *Attwater*, for the defendants. The defendants are carrying out their statutory duties without negligence, and that is all that is required of them. They are authorized to execute a scheme of drainage for the metropolis with storm overflows where necessary, and any scheme where there are storm overflows must create a nuisance under some circumstances. It is of the essence of this scheme that the local authority shall carry it out as they think proper, subject to these two qualifications—that it shall relate to the main drainage of the metropolis, and that the sewage shall be kept out of the Thames in the metropolis as far as practicable. What is practicable is for the local authority to decide. The scheme implies that some sewage must go into the river.

They have to deal with the drainage of London as a whole, and cannot consider what may happen in any particular spot. They have done their best, and that is a sufficient answer to this case.

[FARWELL L.J. "Occupet extremum scabies." You say that to help the first applicant you are entitled to put a burden on some one who has not applied. Ought there not to be compensation?]

It was the intention of the statutes that this work should be

carried out without compensation: *Reg.* v. *Darlington Local Board of Health.* (1)

The power given to them to construct works for the purpose of disposing of the sewage, provided that no nuisance be created, was not intended to diminish the rights which they would have had under s. 24 of the Towns Improvement Clauses Act, 1847, and ss. 7, 37 of the Metropolitan Commission of Sewers Act, 1848. The sewers were vested in the Metropolitan Board of Works by s. 135 of the Metropolis Management Act, 1855, with the duty of cleansing them and disposing of the sewage, but not so as to create a nuisance. It is clear from ss. 1, 2, 3, 23, 24, and 31 of the Metropolis Management Amendment Act, 1858, that in all these Acts the nuisance spoken of is nuisance caused by the construction and maintenance of sewers and disposal of the sewage at the outfall, not by storm-water outlets, which are absolutely necessary and an essential part of the drainage system. Sect. 45 of the Act of 1848 only refers to nuisance caused by the collection of sewage for sale. Under s. 135 of the Act of 1855 the defendants could not discontinue these outlets, for that would create a nuisance. There is nothing in that Act to prohibit them from turning storm-water into the Thames: *Hammersmith Ry. Co.* v. *Brand* (2); *Cowper Essex* v. *Acton Local Board.* (3)

[KENNEDY L.J. referred to *Fletcher* v. *Birkenhead Corporation.* (4)]

In the absence of negligence on the defendants' part they are entitled to construct these works, and no one has any right to complain: *London, Brighton, and South Coast Ry. Co.* v. *Truman.* (5) That principle is accepted, subject to proof that they are acting within their statutory authority, in *Metropolitan Asylum District* v. *Hill* (6), and to proof that they have adopted the best means to avoid a nuisance and have used reasonable care, in *Dixon* v. *Metropolitan Board of Works* (7); *Great Western Ry. Co.* v. *Bishop* (8); *Hammond* v. *St. Pancras Vestry* (9); *Bateman* v. *Poplar District Board of Works* (*No.* 2) (10); *Attorney-General*

(1) (1865) 6 B. & S. 562.
(2) (1869) L. R. 4 H. L. 171, 197.
(3) (1889) 14 App. Cas. 153.
(4) [1907] 1 K. B. 205.
(5) 11 App. Cas. 45, 60.
(6) 6 App. Cas. 193, 199.
(7) 7 Q. B. D. 418.
(8) (1872) L. R. 7 Q. B. 550.
(9) (1874) L. R. 9 C. P. 316.
(10) (1887) 37 Ch. D. 272.

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

v. *Metropolitan Board of Works* (1); *Attorney-General* v. *Birmingham Corporation.* (2)

It is said that the defendants are not entitled to infringe the rights of private owners, but they are not doing so; they have a statutory right to discharge into the Thames, whoever owns the subsoil of the river, provided that they keep the sewage out of the river as far as is practicable; and in fact what they have done has been of great benefit to the plaintiffs.

The conservators of the river Thames have to be consulted about works on the shore of the river—Metropolis Management Amendment Act, 1858, ss. 28 and 29—but otherwise the defendants are exempted from the operation of the Thames Conservancy Acts. At most the plaintiffs' remedy is not an injunction, but damages, having regard to the difficulties involved.

Upjohn, K.C., Jenkins, K.C., and *Sargant,* for the plaintiffs. The plaintiffs are owners in fee simple of the bed and both banks of the creek under grants from the Crown, and it is a trespass to put sewage on their land. Further, as riparian owners, they are entitled to the private right of using the stream for access to their land: *Lyon* v. *Fishmongers' Co.* (3) This creek is the private property of the plaintiffs, subject to certain rights of navigation in the public: *Blundell* v. *Catterall* (4); *Brinckman* v. *Matley* (5); *Lord Fitzhardinge* v. *Purcell.* (6) The Legislature, by expressly authorizing an interference with private rights in two specified cases and by providing compensation in those two cases (see s. 135 of the Act of 1855 and s. 2 of the Act of 1858), impliedly negatives the existence of such a right in other cases. The defendants cannot point to any provision which gives them the right to cast sewage into the Thames. On the contrary, their statutory duty is to construct works for preventing as far as practicable the sewage from flowing into the Thames and for the more effectual drainage of the metropolis, and that the Legislature did not think that the construction of these works necessarily involved a nuisance is shewn by the fact that the defendants are expressly prohibited

(1) 9 L. T. 139; 27 J. P. 597.
(2) 4 K. & J. 528.
(3) (1876) 1 App. Cas. 662.
(4) (1821) 5 B. & Al. 268.
(5) [1904] 2 Ch. 313.
(6) Ante, p. 139.

from exercising their statutory powers in such a way as to create a nuisance. Further, the Legislature does not specify the site of the works to be constructed, but leaves that to the discretion of the Metropolitan Board, and the intention was that they might construct the necessary works as and where they pleased, provided only they did not create a nuisance: *Cator* v. *Lewisham Board of Works* (1); *Vernon* v. *Vestry of St. James, Westminster*. (2) That takes this case out of *London, Brighton, and South Coast Ry. Co.* v. *Truman* (3) and brings it within *Metropolitan Asylum District* v. *Hill*. (4) In *Dixon* v. *Metropolitan Board of Works* (5) Coleridge C.J. found as a fact that no nuisance was created, and that was the only point decided; but in construing s. 135 of the Act of 1855 he took too narrow a view of the effect of the prohibition against nuisance. That view was not necessary to his decision, and it ought not to be followed. The plaintiffs are entitled to relief on the grounds of both nuisance and trespass, and, as the damage is serious, the proper remedy is an injunction. The fact that the nuisance is created by a public body and that it cannot be abated without extensive alterations is not a ground for withholding the injunction, but only for suspending its operation. [*Roderick* v. *Aston Local Board* (6) and *Herring* v. *Metropolitan Board of Works* (7) were also referred to.]

Peterson, K.C., in reply.

Cur. adv. vult.

July 21. COZENS-HARDY M.R. The plaintiffs are the owners and occupiers of extensive factories and works at Battersea on each side of a narrow creek called Battersea Creek, which is part of the Thames and subject to public rights of navigation. They are also owners of the bed and banks of the creek, and they have built two bridges across it which serve to connect the two parts of their works. They have constructed berths for barges and wharves for the purposes of their works, at which a very large number of workmen are employed. The defendants in the early part of last autumn began to pump large quantities of liquid and

(1) 5 B. & S. 115.
(2) 16 Ch. D. 449.
(3) 11 App. Cas. 45.
(4) 6 App. Cas. 193.
(5) 7 Q. B. D. 418.
(6) (1877) 5 Ch. D. 328.
(7) (1865) 19 C. B. (N.S.) 510.

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Cozens-Hardy M.R.

solid sewage into the middle of the plaintiffs' works—that is, into the creek. This is not done every day, though it is often done, and the defendants claim the right to do it, and intend to continue doing it unless restrained by the Court. It cannot be doubted that this has caused an intolerable nuisance to the plaintiffs, nor can it be doubted that by the deposits of foul matter on the berths and banks there has been a trespass. If the defendants were a private individual an injunction would be a matter of course. But the defendants allege that they have statutory authority to create the nuisance and to commit the trespass, and that the plaintiffs are without remedy. Neville J. has rejected this contention. The defendants are the successors of the Metropolitan Board of Works, and are entrusted with the duties and are in enjoyment of the powers and immunities of that body. The Metropolis Management Act, 1855, and the Metropolis Management Amendment Act, 1858, are the only statutes which need be referred to. Before doing so I should state that in 1855 there was a brook called Falcon Brook, which flowed from Tooting Common and discharged into the river Thames at Battersea Creek. It undoubtedly conveyed into Battersea Creek, which is part of the Thames, a certain amount of sewage from the comparatively small number of houses then adjacent to the brook. The whole district is now densely populated. There is no evidence that there was in 1855 a nuisance in the legal sense to the occupiers of the plaintiffs' premises. Moreover, the defendants do not rely upon any prescriptive right, and it is manifest that they could not do so. But by the Act of 1855, s. 135, the main sewers, including Falcon Brook, were vested in the Metropolitan Board of Works. The section proceeds as follows. [His Lordship read the remaining portion of the section, and continued:—] It will be observed that the main purpose of the Legislature was to prevent "all or any part" of the sewage from flowing or passing into the Thames in or near the metropolis. It was not made illegal to permit sewage to flow into the Thames, provided no nuisance was created, but the board were to make such sewers and works as they might think necessary, by intercepting sewers or otherwise, to prevent this; and it is common knowledge

that the present main drainage scheme is the result of this section. It will also be observed that the Legislature did not contemplate that the task imposed upon the board would necessarily involve a nuisance. On the contrary, there are in two instances limits imposed upon their powers by the direction that no nuisance is to be created. By s. 152 a limited power is given to the board to purchase and take land, or an easement over land, but not compulsorily. The Act of 1858 is to be read with the Act of 1855. [His Lordship referred to ss. 1, 2, and 24 of the Act of 1858, and continued :—] Under these Acts a vast system of sewers has been constructed so as to carry the metropolitan sewage to a long distance down the Thames beyond the limits of the metropolis. Amongst other sewers is a low level sewer which lies close to the end of Battersea Creek, and which under ordinary conditions intercepts all the sewage which would have come down the old Falcon Brook. But this low level sewer is not sufficiently large to carry away all the liquid, whether water or sewage, which comes down after a rain. Moreover, a large additional amount of sewage has been brought to this point by means of the Wandsworth sewer recently constructed by the defendants. The result is that houses on some of the low-lying ground on the south of the river are liable to be flooded. To avoid this evil the London County Council have recently erected a pumping station a few yards away from the boundary of the plaintiffs' property, by means of which they are enabled, in case of need, to pump the surplus sewage at all states of the tide into a culvert which leads into the creek in the middle of the plaintiffs' works. The defendants assert that they cannot properly discharge their statutory duties in any other way; that they are by slow degrees duplicating or enlarging their sewers, so that the nuisance will ultimately be reduced, if not wholly abated; and that in the meantime they ought to be allowed to act according to the best of their judgment. In my opinion the defendants' contention ought not to prevail. Certain general principles have been laid down for our guidance in cases of this nature. In the first place, there is a presumption that a public body, whether a trading body or not, is not authorized to create

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Cozens-Hardy M.R.

a nuisance or otherwise to affect private rights unless compensation is provided. In the second place, this presumption must yield where the language of the statute is sufficiently clear to authorize the nuisance without compensation. In the third place, if the statute expressly confers a power but adds a proviso that no nuisance must be created, it is no defence to say that the work, in truth, cannot be done without creating a nuisance. The smallpox hospital case (*Metropolitan Asylum District* v. *Hill* (1)), the Hammersmith Railway Company case (*Hammersmith Ry. Co.* v. *Brand* (2)), and the Birmingham sewage case (*Attorney-General* v. *Birmingham Corporation* (3)) are sufficient illustrations of these principles. Considerations of public welfare may justify the suspension of an injunction upon terms, but they do not justify the denial of relief to the private person whose rights have been affected. Now in the present case the presumption arises, for there is no provision for compensation for the nuisance or the trespass. There is nothing in the statutes which expressly authorizes this pumping station, and there is a great deal to be found in the statutes which suggests that deliberately to discharge sewage into the creek is directly opposed to the policy of the Legislature. Moreover, as I read the statutes, there is an express prohibition against the creation of a nuisance within the limits of the metropolis. So far as the trespass is concerned, I have not been able to discover any plausible excuse for it. In the view which I take it would be wrong to listen to the plea of impossibility. But I may add that I see no reason to suppose that there is any difficulty in abating this nuisance at a moderate expense and without interfering with the general drainage of the metropolis. The late engineer and the present engineer of the defendants both admitted that it would be quite feasible to carry a culvert from the mouth of the existing culvert at the head of the creek into the tideway of the Thames, as is done at the storm outlet nearly opposite Nine Elms, without creating any nuisance. The result is that in my opinion Neville J.'s decision was correct, and this appeal must be dismissed with costs.

(1) 6 App. Cas. 193. (2) L. R. 4 H. L. 171.
(3) 4 K. & J. 528.

FARWELL L.J. The plaintiffs are the owners of the land on both sides of Battersea Creek, a narrow inlet forming part of the Thames, and also of the banks, foreshore, and bed of the said creek. The title to the latter was admitted in the Court below as a possessory title sufficient to maintain trespass, but their title deeds were put in in the Court below and have been discussed in this Court, and it is clear that the plaintiffs are the owners in fee of the whole of the land forming the bed and sides of the creek, subject to the right of public passage over the water when the tide allows. The plaintiffs have large manufacturing works on the banks and employ a number of men therein; they have also, with the licence of the Thames Conservators, berths and mooring stages in the creek itself. The London County Council have within the last twelve months erected and commenced to use pumping apparatus at the head of the creek at a point where Falcon Brook formerly entered it; this pumping is used at times of heavy rain in order to prevent the sewers from becoming choked and driving back the sewage into the houses; the pumping relieves a very large area covered with houses, and in a wet period, such as October, 1907, was put into force nearly every day in the month. The result is that masses of solid filth are cast upon the bed and foreshore of the creek, and adhere to the plaintiffs' barges and posts and chains and create a nuisance. These acts are undoubtedly a trespass upon the plaintiffs' land, and in addition create an intolerable nuisance. The defendants, answer is that they have power by statute to act as they have done, and that, too, without making compensation, and that storm overflows are essential to the system of drainage deliberately adopted by their predecessors, the Metropolitan Board of Works, fifty years ago, and that such system cannot now be altered except at a colossal expense. They rely on the three Acts of 1848, 1855, and 1858, to which reference has already been made; but inasmuch as they do not, and indeed could not, claim any prescriptive right to foul by bringing sewage matter down the Falcon Brook—not only because there is no evidence of any fouling before 1855, but also because of s. 45 of the Act of 1848—I think that the Act of 1848 affords them no assistance whatever. The Acts of 1855 and 1858, which are to be

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Farwell L.J.

read together, inaugurated a great scheme of drainage, the details of which were left to the Metropolitan Board of Works, but the end and object of which was to prevent so far as possible the flow of any sewage matter into the Thames where that river flows through London, and this was carried out by running a line of low level sewers more or less parallel with the river, intercepting and diverting into itself the various brooks or sewers such as the Falcon and the Wandle, and having an outfall at Crossness, some miles down the river. For this purpose the various sewers mentioned in the schedules to the Act of 1855 were vested in the Metropolitan Board of Works, with power to discontinue them if they were not necessary. The powers and duties necessary for the purposes of the Acts are given by s. 135 —(1.) the power and duty to construct, cover and keep, and to cleanse such sewers as should be necessary for preventing as far as possible the entry of sewage into the Thames above the limits of London, and (2.) the power and duty to dispose of the sewage when they have collected it. I find no express power to conduct the sewage into the Thames below London, and I think that such power is to be inferred from the general words, and that the power to sell or dispose of sewage at the end of the section relates to partial disposition in other ways. It may very well be that the object of the Act was to enable the sewage to be cast into the Thames outside the London boundary in any event and whatever might be the consequences; but I think it clear that in conducting it through the London area, that is, in constructing, covering, and keeping the sewers, and also in disposing of sewage in the same area, the board must act so as to cause no nuisance. In other words, *Hammersmith Ry. Co.* v. *Brand* (1) and cases of that class may well apply to the debouching point below London, but can have no application to places within the London area, where all works are to be done so as not to cause a nuisance. Cases which turn on construing general words in Acts as meaning that the thing authorized shall be done in any event regardless of consequences are irrelevant in construing Acts which expressly exclude one event and one consequence, and that the very event and consequence forming the cause of

(1) L. R. 4 H. L. 171.

action. There is nothing in our view to prevent the defendants from using the Falcon Brook outlet as an overflow or otherwise, provided that they do so without trespass and without nuisance. They were not bound to discontinue the Falcon sewer, and it may probably be utilized now by joining it up with a culvert running out into the Thames, but I can find and have heard no semblance of an argument which justifies trespass. It is said that the defendants have power to cast their sewage into the Thames, and that this creek forms part of the Thames; but they have no power to cast it and leave it on private property, although such property be covered with the ebb and flow of the Thames, nor have they any right to cast it into the Thames within the London area at all, unless they can do so without creating a nuisance. It is said, although I think Mr. Cripps candidly confessed that he thought this unsound, that the defendants were entitled to cast it into the creek, making compensation therefor, because they might be able to make a culvert in the creek on giving compensation—a hopeless contention amounting to this, that a grant of a right to carry a drain under my field authorizes the grantee, instead of making the drain, to cover all or any part of my field with his sewage. It has been argued that nothing that the defendants have done can be said to be a breach of any duty to "construct, cover, or keep" within s. 135 of the Act of 1855 or s. 24 of the Act of 1858; and Lord Coleridge's judgment in *Dixon* v. *Metropolitan Board of Works* (1) has been pressed on us. If that case was rightly decided, it cannot stand on the first ground stated, because the duty to make and keep the sewers is not unqualified, but is subject to the express qualification that it is not to be a nuisance, as I have already pointed out, and it is not necessary to express an opinion on the other ground stated, that the nuisance referred to is sewage and refuse, not flood caused by exceptional rainfall. In my opinion it is impossible to say that these two sections refer to construction alone. *Hammersmith Ry. Co.* v. *Brand* (2) on this point has no application to Acts passed for a different purpose and expressed in different language: see *Fletcher* v.

(1) 7 Q.B. D. 418, see at p. 424. (2) L. R. 4 H. L. 171.

C. A.
1908
PRICE'S PATENT CANDLE COMPANY LIMITED v. LONDON COUNTY COUNCIL.
Farwell L.J.

Birkenhead Corporation. (1) The duty to keep the sewers so as not to be a nuisance creates a continuing obligation to keep the sewers in such a state that the sewage will not escape within the London area, either by leakage or otherwise; and to that there is the further duty added that the defendants are not to dispose of the sewage so as to be a nuisance. The one duty may be regarded as negative and the other as positive; they are not to allow it to escape, nor are they actively to dispose of it so as to be a nuisance. The appeal, therefore, fails and must be dismissed with costs.

KENNEDY L.J. In this case there is no dispute that for some time before the commencement of this action the plaintiffs, who have a candle factory on either side of Battersea Creek and are in rightful possession of parts, if not the whole, of the soil of the creek and wharves and berths on and alongside the shores of that creek, have been subjected to very disagreeable annoyance in the form of offensive odours and the adhesion to parts of their property of sewage matter by reason of the working of the defendants' pumping station at the head of the creek just outside the plaintiffs' ground. The annoyance is intermittent and irregular in its recurrence, but it has been sufficient, in point both of frequency and of intensity, to entitle the plaintiffs to the relief which has been given them by the judgment in the Court below, unless the defendants can justify their interference with the plaintiffs' enjoyment of this property, which must for the purposes of this case be taken to include some portion at any rate of the soil of the creek itself, on the ground, which the defendants have taken up, of statutory privilege. The defendants do not and clearly could not, upon the indisputable facts, set up any defence of prescriptive right. It would serve no useful purpose if I set forth the facts, which fully and clearly appear in the judgment of my brother Neville and in the judgments which have just been pronounced in this Court. Upon those facts it appears to me that the duties with which the Metropolitan Board of Works, in whose position the defendants, their statutory successors in regard to metropolitan sewage, stand, are invested by the statutory provisions of the Metropolis Management Acts

(1) [1907] 1 K. B. 205.

of 1855 and 1858 do not impliedly or of necessity involve a right to create such a nuisance as has been proved or admitted to have been created by the use of this pumping station, and that the grant of powers to the sewage authority, as I construe the language in which it has been expressed in the legislation, does in terms impose upon the exercise of those powers, in regard to the use of authorized works and the disposal of sewage, the limitation that it shall not be such an exercise as to create a nuisance. I cannot find in the Acts of Parliament anything which would justify me in holding that works, which may form a necessary step, as the defendants contend they do, in the carrying out of the gradual development of the great scheme of preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, may now be used by the sewage authority so as to create a nuisance, subject to compensation to the persons injured by the nuisance. The provisions for compensation do not appear to me to apply to such a case as the present, but only (in regard to injury to property) to cases in which either, first, sewers or works are carried into, through, or under any lands of private owners, or, secondly, in which wharves, jetties, or other property damaged by the construction of any works through, along, over, or under the bed and soil and banks and shore of the river Thames. The facts here do not bring the present case within either of these classes of permissible interference with private rights or private property. It must be admitted by every one, as it is by Neville J., that the defendants are in a position of practical difficulty, as it is of enormous importance on public grounds that, whilst the great scheme for disposing of the sewage elsewhere than in that part of the Thames where it flows in or near the metropolis (the avowed object of the Legislature, as appears by the Metropolis Management Act, 1855, s. 135) is in progress of execution by the carriage of the sewage to Crossness, the large low-lying area of southern London, with its dense population, should, by means of overflow and storm outlets into the Thames which will relieve the main and intercepting sewers at times of exceptional stress through heavy rainfall, be protected from serious damage to the health and comfort of the inhabitants

C. A. 1908

PRICE'S PATENT CANDLE COMPANY, LIMITED v. LONDON COUNTY COUNCIL.

Kennedy L.J.

through the penning back of sewage and storm-water. As the learned judge observes, it may be that, if the view of the statutes which both he and this Court take is right, it will be impossible, or, at least, very difficult, for the London County Council effectively to maintain the drainage of the metropolis without further statutory powers, and, as he also says, there is little doubt that the Legislature would give further powers, subject, of course, to the compensation of those private rights which may be interfered with by the action of the council. But we have to construe the statutes as they stand, and for the reasons which have been given I entirely agree with the learned judge in the Court below and the other members of this Court that the plaintiffs are entitled to redress for an actionable nuisance at this portion of the river. I prefer to rest my judgment on this ground of nuisance. The Master of the Rolls and Farwell L.J., and, as I understand the report of the proceedings in the Court below, Neville J. also, are of opinion that by pumping the storm-water, mixed with sewage, into Battersea Creek the plaintiffs have incurred a distinct liability as trespassers. I feel some doubt upon this point; and, as we are agreed that our conclusion upon the question of the nuisance renders a final conclusion upon this point of trespass unimportant, it is, I think, only necessary that I should indicate very briefly the ground of that doubt, which is that if it be granted, or ought to be granted, that the discharge of sewage into the Thames (of which this creek forms a part) is not of itself illegal, I feel a difficulty in holding, as the contention of the plaintiffs on this trespass point necessitates, that a trespass is committed whenever in the course of the river's flow and reflow solid portions of that sewage are deposited and lodge upon any portion of the bed or adjacent bank which is not owned by the sewage authority. But I have no doubt that if, as in the present case, the deposit occurs to an extent which (evil smell apart) constitutes a nuisance, then, as in the present case, the owner of the property affected has a right of action for that nuisance. I prefer, therefore, to rest my concurrence in the judgment appealed from on the ground of nuisance.

Solicitors: *Bristows, Cooke & Carpmael; E. Tanner.*

H. B. H.

ATTORNEY-GENERAL *v.* BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

KEKEWICH J.

1907

Oct. 25, 28, 29, 30, 31; *Nov.* 1, 5, 6, 21.

[1899 A. 844.]

Local Sanitary Authority — Natural Stream — Pollution — Sewage Works — "Deterioration of the Water" — Injunction — Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 17.

According to the true construction of s. 17 of the Public Health Act, 1875, the water in a natural stream, the quality and purity of which is alleged to have been deteriorated by an effluent from a sewage farm, is not water of an arbitrary standard of purity and quality, but the actual water of the stream itself, into which the sewage or filthy water is conveyed.

Where a drainage board conveyed into an already polluted stream, at certain points, water "not freed from all excrementitious or other foul or noxious matter," and thus affected so as to deteriorate the purity and quality of the water of the stream at the points where such effluents were discharged:—

Held, that an injunction must be granted, at the instance of the Attorney-General, in the terms of s. 17 of the Public Health Act, 1875, to restrain such pollution.

It was the intention of the Legislature to provide that at no one point in the stream should offending liquor be conveyed into it, and it is no answer on the part of a drainage board to say that by discharging elsewhere into a polluted stream better effluents they have improved the quality of the water as a whole.

THIS was an action by the Attorney-General, at the relation of the Corporation of Tamworth and the Tamworth Rural District Council, against the Birmingham, Tame, and Rea District Drainage Board for an injunction to restrain the defendants from making or using any sewer, drain, or outfall in or about their sewage farm, known as the Birmingham Sewage Farm, at Saltley, in the city of Birmingham, for the purpose of conveying and from conveying sewage or filthy water into the river Tame, until such sewage or filthy water was freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in the said river. The river Tame was a natural stream rising in Staffordshire and

KEKEWICH J.

1907

ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

flowing through various county boroughs. After leaving Staffordshire it flowed into Warwickshire, and before arriving at the defendants' sewage works it passed through the city of Birmingham and other neighbouring districts, having a population of about 754,000. The normal flow of water in the Tame was about 17,000,000 gallons daily, and it was a polluted and sluggish stream when it reached the defendants' sewage farm. The defendants were a joint board established under s. 279 of the Public Health Act, 1875, for the purpose of treating the sewage of the city of Birmingham and various other urban and rural sanitary districts. They had taken over certain lands and works from their predecessors, and were possessed of about 2800 acres of land on the banks of the Tame, with extensive sewage disposal works and irrigation lands, commencing at Salford Bridge and extending for six miles to Sweetmore Bridge. The borough of Tamworth was situated fourteen miles lower down the river Tame. The method of treatment of the sewage was shortly as follows. The sewage from the Birmingham district came into the defendants' works at Salford Bridge and, after passing through roughing tanks, was conducted into septic tanks capable of treating 40,000,000 gallons per day. In wet weather anything beyond that amount went direct into the river Tame through artificial brick channels. The dry weather flow of sewage was about 25,000,000 gallons daily. A portion of the 40,000,000 gallons passed over four acres of bacteria beds, and the effluent therefrom passed by a channel into the river. The rest of the liquid or tank effluent was carried on by a conduit, and was partly drawn off for irrigation purposes and partly treated in lagoons by downward intermittent filtration. The overflow from these lagoons went into the river direct and, according to the evidence, was worse than the river itself at the points of discharge. The remainder of the tank effluent was conveyed to bacteria beds sixteen acres in extent further down, and after treatment, which rendered it a comparatively innocuous liquid, it was conveyed by an open carrier into the Tame near Sweetmore Bridge. The river Rea, which joined the Tame just below the septic tanks at Saltley, was about one quarter of the size of the Tame, and was highly charged with sewage before it reached

the defendants' farm. The plaintiff alleged that the defendants had made and used their sewers and drains and the outfalls from their main sewer or conduit and tanks for the purpose of conveying sewage and filthy water into the river Tame, and that it had not been freed from all excrementitious or other foul or noxious matter before being poured into the stream, and that it consequently seriously affected and deteriorated the purity and quality of the water.

The defendants pleaded that they had expended 250,488*l.* in carrying out works authorized by the Birmingham, Tame, and Rea District Drainage Board Act, 1897, and were making further bacteria beds and many other improvements. They also relied upon the fact that the river Tame was very greatly polluted, quite apart from any acts done or left undone by the defendants, before it reached their sewage farm, and they alleged that the water of the river below their works was much purer than when it entered them. A large mass of evidence was given mainly in respect of the quality of the effluents.

Macmorran, K.C., *Stewart-Smith, K.C.*, and *John Henderson*, for the plaintiff. The question at issue is whether the effluent which passes into the Tame from the defendants' sewage works has been freed from all noxious matter. The system of the defendants is capable of treating 40,000,000 gallons only, and the overflow and storm water go into the river Tame. They have, on the evidence, committed a breach of the statutory duty imposed upon them by s. 17 of the Public Health Act. (1) That section contains a statutory prohibition, and it was so held in the case of *Durrant* v. *Branksome Urban Council*. (2) What the section prohibits is the sending into the river that which would deteriorate the purity and quality of water in a natural stream or watercourse, that is

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55):—

Sect. 17: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

(2) [1897] 2 Ch. 291.

KEKEWICH J.

1907

ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

to say, the water in its natural unpolluted condition. That construction also commended itself to Sir George Jessel in the case of *Attorney-General* v. *Cockermouth Local Board* (1), where similar words in the Local Government Act (1858) Amendment Act of 1861 (24 & 25 Vict. c. 61), s. 4, were considered. The judge there said that the clause means "you shall not send your sewage water into a natural stream until you have made it wholesome water—until you have got rid of all the noxious matter in it," and "you are not to affect or deteriorate the water in the river at the point where the outfall is." In the present case the result of the evidence is that untreated sewage does get directly into the Tame, and the provisions of s. 17 have not been complied with. The plaintiff is entitled to the injunction which is claimed.

Warmington, K.C., P. O. Lawrence, K.C., and *T. T. Methold*, for the defendants. Sect. 17 of the Public Health Act is prohibitive, no doubt, but the question is what it prohibits. The section presupposes that sewage or filthy water may go into the stream. The defendants have to free it from the sewage to prevent it from affecting, so as to deteriorate, the purity and quality of the water of the river. The test of whether the effluent affects or deteriorates must be determined by the character of the water in the stream itself as you find it. That is the true test. In the present case the defendants have not analysed the water of the Tame above their works. It is an admittedly polluted river, and not an ordinary running stream in an agricultural district. The evidence goes to shew that the stream as a whole is purer below the defendants' sewage works than above, as many of the effluents sent into it are purer than the water of the river at the points of discharge. The burden of proof is on the plaintiff to shew that the water has been deteriorated. Further, no injury has been done to the public, and the Court is not bound to interfere by injunction against a public body performing a difficult duty.

Macmorran, K.C., in reply. There is little authority upon the construction of this statute, but the case of *Staffordshire County Council* v. *Seisdon Rural Council* (2) is in pari materia and was a

(1) (1874) L. R. 18 Eq. 172.

(2) (1907) 5 L. G. R. 347, 356.

case under the Rivers Pollution Prevention Act of 1876. Another similar case of *Haineworth* v. *West Riding of Yorkshire Rivers Board* (1) is mentioned in the note at the end of the last-mentioned case. It is no answer to say that the drainage works are being improved and the stream is better than it was before. The only question is whether the Act of Parliament has been observed. In respect of the lagoon water and several of the other effluents the case of the plaintiff has been established.

Cur. adv. vult.

1907. Nov. 21. KEKEWICH J. delivered the following written judgment:—The defendants are a local authority exercising the powers and subjected to the restrictions provided by ss. 16 and 17 of the Public Health Act, 1875. The Attorney-General contends that in exercise of their powers the defendants have not observed those restrictions, and the ultimate question for determination is whether this contention is well founded or not. Obviously, it is impossible to determine whether the restrictions have been observed or not without knowing precisely what those restrictions are. This involves an examination of s. 17, in which they are contained. They are restrictions on the conveyance into any natural stream or watercourse (I omit the words "or into any canal, pond, or lake") of sewage or filthy water, and it is necessarily implied, even if there be no other authority in that behalf, that sewage or filthy water may be thus conveyed. The restrictions are to be found in the latter half of the section, which says that this is not to be done until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would "affect or deteriorate the purity and quality of the water in such stream or watercourse." This again necessarily implies that excrementitious or other foul or noxious matter may be conveyed, for it is not said that none such shall be conveyed into any natural stream or watercourse, but only that there shall not be conveyed into it such as would affect or deteriorate the purity and quality of the water. It seems to me that, on the grammatical and reasonable interpretation of the language, what

(1) Unreported.

KEKEWICH J.
1907
ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

the Legislature intended to prohibit was the deterioration, that is, the making worse the purity and quality of the stream or watercourse, and that no one can be said to have offended against the prohibition if as a matter of fact there has been no such deterioration. But what is the subject of deterioration? The purity and quality of the water in the stream or watercourse into which the sewage or filthy water is conveyed, or water of an arbitrary standard of purity and quality determined, not by the actual facts of each case, but laid down by some rule irrespective of these facts? Again, it seems to me that, according to the grammatical and reasonable construction of the language, the purity and quality must be those of the water in the stream or watercourse into which the sewage or filthy water is conveyed, and it is impossible to conclude that there has been an offence against the prohibition unless that special purity and quality have been shewn to be deteriorated. The Legislature speaks of the stream or watercourse and of the water in such stream or watercourse as a whole, and it is contended on behalf of the defendants that in judging the effect of their operations one must regard this stream as a whole, and that if, regarded as a whole, the water in the stream or watercourse has not been deteriorated, no offence has been or can be established. But the stream may be many miles in length, and, owing to a variety of natural or adventitious circumstances, the purity and quality may vary so as to be entirely different at different points; and the body exercising the power of drainage into the stream may convey sewage or filthy water into it at different points, and, if the stream is to be regarded as a whole, they may reasonably ask for judgment on all their operations as a whole, and say they have committed no offence against the Act, because the operations thus united have produced no deterioration, notwithstanding that at some one or more point or points such deterioration is distinctly produced. I entertain no doubt that, on the proper construction of the section, the Legislature must be taken to have intended that at no one point in the stream shall offending liquid be conveyed into it, and that the offence at one point cannot be avoided or excused by careful observance of the prohibition elsewhere. This is my own view of the construction of the section, but it agrees with that expressed

by Sir George Jessel in *Attorney-General* v. *Cockermouth Local Board.* (1)

The plaintiff, on whom the burden of proof lies, has therefore to establish that at some point or points the defendants have conveyed into the river Tame sewage or filthy water which has affected or deteriorated—that is, as I understand it, has affected so as to deteriorate—the purity and quality of the water in the river at that point. In order to solve this question of fact one must know two things—first, what was the purity and quality of the water at the selected point before the sewage or filthy water was conveyed into it; and, secondly, what was the character of such sewage or filthy water? These things once known with reasonable precision, there ought not to be any great difficulty in deciding whether what is conveyed into the river makes it worse than it was before. I cannot adopt the view that the purity and quality of the river ought to be judged by any standard other than one of fact. I cannot think that I ought to regard the river as being any different from what it really is. If it is suggested that the river must be presupposed to be of the character which may be found in an ordinary agricultural district, perhaps transparent and pleasant to the eye, capable of sustaining fish life, and even drinkable by cattle, and useful for domestic purposes, though not drinkable by man, the answer is, first, that there is no ascertained standard of the purity and quality of such rivers; and, secondly, that there is no reason for accepting such a standard, if ascertained, rather than that of a hill stream far less amenable to pollution, or, on the other hand, the standard of streams in a manufacturing district, where the pollution is likely to be far greater. You must, in my judgment, inquire what is in fact the purity and quality of the particular stream, and then further inquire whether it has in fact been deteriorated.

Seeing that the section to be construed is in an Act which has been in force for over thirty-five years, and was taken, with little and unimportant variation of language, from Acts of earlier date, it is strange that the construction has not hitherto been the subject of authoritative decision. It may be that the

(1) L. R. 18 Eq. 172.

KEKEWICH J.
1907
ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

construction has seemed to others, as it seems to me, to be reasonably plain, and that, for that reason, the subject has not been before discussed as it has been discussed in this case. It was endeavoured, on the part of the plaintiff, to make out that in *Attorney-General* v. *Cockermouth Local Board* (1) Sir George Jessel placed a construction on the section different from that which I have placed upon it, and there is a passage on page 177 in which he expresses the view that sewage water must not be sent into a natural stream until it has been made wholesome water, until all the noxious matter has been got rid of. It is not fair to the learned judge to take this passage by itself and to treat him as there stating the whole meaning of the section. He was not called upon to express, and did not intend to express, any opinion on the meaning of the language which I have been criticizing, and it is obvious, from other passages in his judgment, that he had present to his mind the necessity of establishing deterioration in order to establish an offence against the Act. Indeed on page 178 he says, "The Legislature is of opinion that it is desirable to preserve our natural streams in at least their present state of purity," from which it may be inferred that he regarded the standard of fact at the time of challenge as that by which alleged offenders were to be judged. One other case was cited as bearing on this point, *Durrant* v. *Branksome Urban Council*. (2) North J. and the Court of Appeal were there considering whether by conveying sand and silt into a stream in which sand and silt already existed the defendants committed an offence against the prohibition of s. 17. There are passages in the judgments otherwise dealing with the construction of the section, but they must all be read with reference to the one point decided, and with no such point are we here in any wise concerned.

I have no doubt, and indeed it has been conclusively proved, that the defendants have done their best to discharge the duty thus imposed on them by the Legislature, and that to this end they have employed not only money without stint, but, to the best of their ability, and so far as circumstances have hitherto permitted, all the means which the resources of modern science

(1) L. R. 18 Eq. 172. (2) [1897] 2 Ch. 291.

have placed at their disposal. Nevertheless, what I have to consider is not what they have attempted to do, or the manner in which they have done it, but a bare question of fact, whether in the result they have succeeded in their attempt, or whether, notwithstanding all they have done, they now convey into the river Tame sewage or filthy water not freed from all excrementitious or other foul or noxious matter such as will affect or deteriorate the purity and quality of the water in that river. In the course of the argument there was some discussion about the meaning of the words "excrementitious or other foul or noxious matter." I need not dwell on that discussion here. There can be no doubt that occasionally and frequently, if not constantly, the defendants have conveyed into the river Tame, at some point or points, what, in consequence of more or less elaborate processes, may be termed a more or less purified effluent, but which originates from the contents of their sewers, and partakes, in varying proportions and sometimes largely, of the character inherent in the ordinary contents of those sewers. Of course I am not saying that the defendants do not convey into the river much that could be described as a good effluent in the sense in which those words are used by experts in such matters, but it is beyond doubt that they also convey into it much that cannot be so described, and which must be classed as not freed from all excrementitious or other foul or noxious matter. This, however, is not sufficient to convict them of an offence against the prohibition in s. 17. Their defence, which I hold to be a good defence in law, is that the Tame is a river the purity and quality of the water in which is of low standard, and that they do not, by what they convey into the river, affect or deteriorate that purity and quality. This brings me to the question which I have above stated to be the ultimate question for decision in this case, namely, is that defence good in fact?

The task of examining the evidence has been more laborious and difficult by reason of that evidence not being directly addressed to the issue which I have stated to be the one requiring decision. An issue of that character was not treated as crucial by counsel on either side, except, to some extent, in reply; and the expert witnesses, though sometimes approaching

KEKEWICH J.

1907

ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

it, shewed that they never had given and were not giving to it the importance which I have done. This is not a matter of surprise or blame, for in such a case as this both parties are anxious to bring before the Court any view likely to find favour now or hereafter, and to support their views by any facts which are relevant. Nevertheless, treating the real question as I do, much of the evidence is capable of elimination, and a further proportion becomes comparatively unimportant. I will endeavour briefly to summarize such facts as appear to me to bear immediately on the question for determination.

The pollution of the river Tame commences almost at its source, each tributary brings in its quota, and by the time it reaches the defendants' works it may fairly be described as a foul stream. Shortly below this point it is joined by the river Rea, which, being itself a foul stream, must add to the pollution of the united river. It is into this united river that the defendants convey their effluent. Giving credit to the defendants for being able, with their present appliances, to deal satisfactorily with a quantity of sewage somewhat in excess of the daily dry weather flow into the sewers, there still remain to be dealt with by them, from time to time, accretions caused by storm, which occasionally mount up to a high figure. There is no need to contemplate the extreme limits of these occasional accretions, because, after a while, dilution increases in proportion to the volume of liquid brought down, and probably a really violent and prolonged storm does no mischief.

But the first effect of a storm is to bring down a vast quantity of accumulated filth, with the result that the powers of the purifying processes are soon overtaxed, and there has to be got rid of, somehow or other, a large quantity of liquid containing foul or noxious matter. It must eventually find its way into the river, and, having regard to the limited powers of the purifying processes, one would expect it to find that way in a bad state. Applying strictly the rules which I have laid down for my own guidance, I must not inquire whether, having regard to all the points at which effluent is discharged into the river, there is any deterioration of the river as a whole, nor must I be influenced by the fact, if fact it be, that at any given point, say at

Sweetmore Bridge or lower down, the river is purer or less impure than it is at the point of junction with the Rea, or at a point above the defendants' works. Is the effluent at any point of its discharge into the river such as to deteriorate the purity and quality of the river at that point? I should hesitate to answer this question adversely to the defendants if the discharge at a selected point were of small quantity as compared with the discharge elsewhere, and I should hesitate still more if the discharge complained of could be proved to be due to accidental causes, even if repetition of them were probable. But it is proved beyond dispute that the defendants frequently discharge into the river what is styled in the evidence lagoon water, that is, water which has been collected in lagoons constructed for the express purpose of receiving it, and where the purification is of slight character. And this is a matter of necessity. The defendants' own witnesses admit that the lagoons have from time to time to be drained, and that the drainage must go, and does go, into the river. There is one point at which it is conveyed by means of a shoot constructed for the purpose and capable of discharging a large volume. The same witnesses admit that this lagoon water is worse than the river itself at the point of discharge, and inasmuch as the presence of excrementitious or other foul or noxious matter is not in question, it follows that the purity and quality of the water must be thereby affected so as to be deteriorated. Examination of the evidence shews that the same thing occurs at other points, and again, on the admissions of the defendants' own witnesses, what is conveyed into the river from receptacles other than the lagoons is worse than the river itself. If the discharge of the lagoon water were got rid of, there would still be the discharge at these other points to be dealt with, and I must not be understood as treating that as not equally important because I do not pause to specify those other points or to recapitulate the evidence concerning them. I mention the discharge of the lagoon water more particularly because, first, it is sufficient for my conclusion, and, secondly, because one argument of the defendants, to be treated in the sequel, is especially applicable to it. I find that as a fact the defendants convey into the river Tame, by the discharge of

KEKEWICH J.

1907

ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD.

lagoon water and otherwise, water not freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such river.

What then is my duty? The defendants appeal to me not to grant an injunction. They allege, and the evidence fully supports that allegation, that they have been persistently struggling against great difficulties and that they have met with a large measure of success, that there is no reason to believe that they will not persistently struggle, and that there is every reason to believe that success in the future will be greater than it has been in the past. Science in this particular department has made large strides in recent years; methods and processes which were formerly thought effective have been proved to be of little value, and there have been brought into prominence other methods and processes which have received the stamp of authority and are regarded by scientific men as certain to hold the field. One of the discarded methods is purification by lagoons, but this method cannot, especially in such large works as those of the defendants, be got rid of all at once, and time must be occupied in constructing the bacteria beds which are to take its place and collecting the material necessary for that purpose. "Within a reasonable time," say the defendants, "we shall be able to satisfy the plaintiff and the Court that we are no longer committing any offence against the Act, and we ask that we may have a reasonable opportunity for doing this without in the interval being placed under the ban of an injunction."

To this appeal I am not at liberty to accede. As I understand the law, the Attorney-General, coming to complain that a public body is exceeding its powers, or committing some offence against a statute, is entitled as a matter of right, on proving his case, to the only relief which the Court can grant, namely, an injunction in one form or another. Convenience, which sometimes assists the Court in other cases to avoid granting an injunction, while making a declaration of right, is not, in my judgment, applicable to such a case as the present, where the Attorney-General is plaintiff. Nor am I disposed to suspend the operation of an injunction. That method of procedure ought, I think, to be limited to cases where it is desired to submit the question to a

higher Court, or where certain works are proposed to be done to get rid of the cause of complaint, as, for instance, by abating a nuisance. I do not think that the remedies which the defendants propose to adopt are sufficiently certain or can be perfected within a sufficiently definite time to make that procedure applicable here. On the other hand, I think that the defendants deserve gentle treatment. I will not repeat what I have said before about their endeavours in the past, or the certainty of their perseverance in the future; but all this deserves the benevolent attention of the Attorney-General, who of course looks at these matters from a public point of view, and must take into consideration all the difficulties which beset the defendants in dealing with the vast problem entrusted to them—a problem, be it observed, involving practical questions of the highest importance to the community at large, far beyond any discussed in this case. Consideration of the whole position is a matter for the discretion of the Attorney-General, and it would be impertinent of me to say more. But I will venture to add this. An injunction cannot be enforced by any process without an order of the Court, and the Court would be extremely reluctant to allow process to issue unless and until the defendants have had a reasonable time for remedying the present state of affairs and have neglected to use the opportunity thus afforded to the best advantage.

Judgment must go for an injunction as asked, that is, following the exact terms of s. 17 of the Public Health Act, 1875, and the defendants must pay the costs from the foot of the last taxation.

Solicitors: *Braikenridge & Edwards, for Nevill & Matthews, Tamworth; Sharpe, Parker, Pritchards, Barham & Lawford, for E. O. Smith, Birmingham.*

G. M.

SWINFEN EADY J.

1908

July 4, 8, 18.

CUNARD STEAMSHIP COMPANY, LIMITED *v.* HOPWOOD.

[1908 C. 2110.]

Company—Debenture Stock—Covering Deed—Specific Ships—Specific ancillary Mortgages — Substituted Security — Registration — Companies Act, 1900 (63 *& 64 Vict. c.* 48), *s.* 14.

Sect. 14, sub-s. 4, of the Companies Act, 1900, applies to an issue of debenture stock secured by a covering deed containing any charge to the benefit of which the stockholders of that issue are entitled pari passu. If the covering deed contains specific equitable charges on specific ships, and the particulars required by s. 14, sub-s. 4, are registered, then for the purposes of s. 14 that registration will not only cover subsequent statutory mortgages of those specific ships required to complete the security, but also statutory mortgages of any ships substituted therefor under the powers of the covering deed.

In re Harrogate Estates, Ld., [1903] 1 Ch. 498, and *In re Yolland, Husson & Birkett, Ld.*, [1908] 1 Ch. 152, applied.

Cornbrook Brewery Co. v. *Law Debenture Corporation*, [1904] 1 Ch. 103, distinguished.

Special Case.

The plaintiff company was incorporated under the Companies Acts, 1862 to 1877, on May 23, 1878, with a capital of 2,000,000*l.*, divided into 100,000 shares of 20*l.* each.

By the memorandum of association the company had power to borrow or raise money by the issue of debentures or by mortgage or charge of all or any part of the company's property, and by article 83 the directors might from time to time borrow or raise for the purposes of the company such sums of money as they should think proper as therein mentioned.

On December 3, 1903, a resolution was duly passed at a meeting of the directors duly convened that an issue of 2,600,000*l.* debenture stock be constituted in accordance with the provisions of an agreement dated July 30, 1903, and made between the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, the Board of

Trade, and the Postmaster-General of the one part, and the company of the other part, and that the company's seal be affixed to the trust deed next mentioned for securing that debenture stock.

The trust deed was dated December 3, 1903, and made between the company of the one part and the trustees of the other part.

The material provisions were as follows:—

Clause 1: "In these presents unless there be something in the subject or context inconsistent therewith the expressions following shall have the meanings hereinafter mentioned (that is to say)—

"'The stock' means the sum of 2,600,000*l.* owing to the trustees under clause 2 hereof or such part thereof as for the time being shall be so owing.

"'The specifically mortgaged premises' means the steamships and their appurtenances specified or referred to in the first schedule hereto and the two new steamships to be built in accordance with the provisions of the hereinbefore recited agreement of July 30, 1903, and which are to be assured to or vested in the trustees in accordance with clause 7 hereof and all other property which under the provisions hereof is made a specific security for the payment of the moneys hereby secured.

"'The general assets' means the assets of the company charged by clause 9 hereof and does not include the specifically mortgaged premises.

"'The mortgaged premises' means and includes the specifically mortgaged premises and the general assets collectively."

By clause 2 the company acknowledged that it was indebted to the trustees in the sum of 2,600,000*l.*, carrying interest at the rate of 2*l.* 15*s.* per cent. per annum.

Clause 7: "The company shall forthwith mortgage or cause to be mortgaged to the trustees the steamships with their appurtenances specified or referred to in the first schedule hereto and (as and when the same shall be completed) the two steamships to be built in accordance with the provisions of the hereinbefore recited agreement of July 30, 1903, and (as and when the same shall be completed) any vessel built under the provisions

SWINFEN EADY J.
1908
CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

of the said agreement in substitution for either of the said two last-mentioned steamships or in substitution for any such substituted vessel. Such mortgage in each case to be a first mortgage duly effected in accordance with and registered under the Merchant Shipping Act, 1894, for securing the moneys hereby secured. . . . ."

Clause 8: "The company as beneficial owner hereby charges in favour of the trustees the specifically mortgaged premises with the payment of the stock and the interest thereon and other moneys intended to be hereby secured to the intent that such charge may be a specific charge and not a floating charge for the payment of such moneys."

Clause 9: "The assets and undertaking for the time being of the company other than the specifically mortgaged premises shall stand charged with the payment to the trustees of the stock and the interest thereon and all other moneys intended to be hereby secured and such charge shall be a floating security and accordingly shall in no way hinder or prevent the company from selling alienating mortgaging charging leasing letting on hire chartering paying dividends out of profits or otherwise disposing of or dealing with such assets provided that the company shall not alien mortgage charge let on hire or charter any vessel in the course of construction (which if completed would form part of the specifically mortgaged premises) further or otherwise than might be done under these presents and the said agreement of July 30, 1903, if such vessel had been in fact completed."

Clause 10: "The trustees shall permit the company to hold and enjoy the mortgaged premises and to carry on therein and therewith the business or any of the businesses authorised by the memorandum of association . . . . until the security hereby constituted becomes enforceable as hereinafter provided and at any time after the same becomes enforceable the trustees shall upon the request in writing of the holder or holders of the stock and without any further consent on the part of the company or its assigns enter upon or take possession of the mortgaged premises and shall upon the like request sell call in collect and convert into money the same or any part thereof in such manner as the trustees shall think fit. . . . ."

Clause 11 specified the events in which the security was to become enforceable.

Clause 12 excluded s. 20 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and imposed certain restrictions on the exercise of the trust for conversion in clause 10, thereinafter referred to as "the primary trust for conversion."

Clause 15: "The trustees shall hold the moneys to arise from any sale calling in collection or conversion under the primary trust for conversion upon trust and they shall thereout in the first place pay or retain the costs and expenses incurred in or about the execution of such trusts or otherwise in relation to these presents including the trustees' remuneration and shall apply the residue of such moneys First in or towards payment to the stockholders pari passu in proportion to the amount due to them respectively and without any preference or priority whatsoever of all arrears of interest remaining unpaid on the stock held by them respectively Secondly, in or towards payment to the stockholders pari passu in proportion to the stock held by them respectively and without any preference or priority on account of priority of issue or otherwise howsoever of all principal moneys due in respect of the stock held by them respectively and that whether the same principal moneys shall or shall not then be payable and Thirdly, shall pay the surplus (if any) of such moneys to the company or its assigns."

Clause 16: "As regards the specifically mortgaged premises the trustees shall have power at the request and expense of the company . . . . to exchange any part or parts of the specifically mortgaged premises for any other property suitable for the purposes of the company. . . . ."

Clause 17: "All nett capital moneys . . . . arising under the last preceding clause and all assets acquired pursuant thereto shall become part of the specifically mortgaged premises and shall be vested in the trustees accordingly."

Clause 19: "The company shall be at liberty at any time or times during the continuance of the security with the permission of the trustees to withdraw from the trusts hereof relating exclusively to the specifically mortgaged premises any of the specifically mortgaged premises upon substituting other property

SWINFEN EADY J.
1908
CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

whether of the same or a different kind but of a value equal to or greater than the value of the property proposed to be withdrawn, but before the trustees permit the company to withdraw any property under this clause the company must prove to the satisfaction of the trustees that the property proposed to be substituted for the same is of a value equal to or greater than the property proposed to be withdrawn and that such property is suitable for the purposes of the company and must convey to or otherwise vest such property in the trustees in such manner as they shall direct upon the trusts hereof relating to the specifically mortgaged premises and thereupon the trustees shall convey to the company or as the company may direct the property proposed to be withdrawn to hold the same free from the trusts hereby declared exclusively concerning the specifically mortgaged premises to the intent that the same may become part of the general assets. . . . ."

The first schedule contained the names of the seventeen ships set out infra in the particulars of property charged.

The second schedule contained conditions as to the issue of stock.

Condition 6 provided that "Every holder of stock will be entitled to a certificate under the seal of the company stating the amount of the stock held by him and every such certificate shall refer to these presents."

The 2,600,000*l.* debenture stock was duly issued pursuant to the resolution of December 3, 1903, and the whole of it was still outstanding. The debenture stock certificates were in the following form:—

"No. £

"The Cunard Steamship Company, Limited.

"Debenture Stock.

"Issue of 2,600,000*l.* debenture stock made pursuant to clause 83 of the company's articles and to a resolution of the Board dated December 3, 1903.

"This is to certify that of are the registered holders of pounds of the above stock which

stock is constituted and secured by the trust deed dated December 3, 1903, and made between the company of the one part and (the trustees, naming them) of the other part and is issued subject to the provisions contained in that deed.

"Given under the common seal of the company this day of 190 .

} Directors.

Secretary."

With a view of complying with the requirements of s. 14 of the Companies Act, 1900, with regard to the said issue of debenture stock, the company supplied certain particulars to the Registrar of Joint Stock Companies, and on December 22, 1903, certain particulars were duly registered under the said section, namely, the date of the "trust deed for securing debenture stock," the amount secured by the debenture stock, short particulars of the property charged, and the names of the trustees for the debenture stock holders. The date of the resolution creating the series of debentures (i.e., debenture stock) was omitted by inadvertence from the third column of the particulars (see Form of Particulars in Buckley on Companies, 8th ed. p. 802, form 47).

The property charged was described as: "The steamships (Saxonia Ivernia) *Lucania Campania Ultonia Umbria Etruria Aurania* (Sylvania Veria Pavia Tyria Cypria) *Aleppo Saragossa Cherbourg Skirmisher* with their appurtenances, also two new steamships to be built in accordance with the provisions of an agreement dated July 30, 1903, together with a floating charge on the assets and undertaking for the time being of the company other than the above specifically mortgaged vessels." The seven ships in brackets were subsequently released, and may be disregarded.

On December 22, 1903, the Registrar of Joint Stock Companies gave a certificate under his hand pursuant to s. 14 in the following terms:—

"I hereby certify that a mortgage or charge by way of trust deed dated December 3, 1903, and created by the Cunard Steamship Company Limited for securing the sum of 2,600,000*l.*

SWINFEN EADY J.
1908
CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

debenture stock was this day registered pursuant to s. 14 of the Companies Act, 1900."

A copy of this certificate was indorsed on every certificate of debenture stock issued.

On December 16, 1904, the company duly executed mortgages of nine of the original ships, namely, the *Lucania*, *Campania*, *Ultonia*, *Umbria*, *Etruria*, *Aleppo*, *Saragossa*, *Cherbourg*, and *Skirmisher*, in accordance with the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

The mortgages, which were drawn according to Form B (ii.) of Sched. I., Part I., were duly registered on December 17, 1904, at the Custom House, Liverpool.

On February 17, 1905, the company duly executed a mortgage of the steamship *Brescia*, which had been substituted for the tenth original ship, *Aurania*, by agreement between the company and the trustees. On February 18, 1905, the *Brescia* mortgage was registered at the Custom House, Liverpool.

On October 18, 1907, the company duly executed a mortgage of the steamship *Lusitania*, one of the two ships of large size and high speed referred to in the trust deed, and particularly mentioned in clause 7. On October 19, 1907, this mortgage was registered at the Custom House, Liverpool.

None of the above ship mortgages were registered under s. 14 of the Companies Act, 1900. The question whether this was necessary was raised in October, 1907, and when the *Mauretania*, the other large ship referred to in the trust deed, was mortgaged on December 19, 1907, the mortgage was registered on January 6, 1908, under s. 14 by way of precaution.

On June 25, 1908, the trustees obtained an order extending the time for registration of the mortgages of the nine original ships and the substituted ship *Brescia* and the new ship *Lusitania* for twenty-one days from the date of the order. The company contended that registration was unnecessary, but the Court declined to decide the point on originating motion : *In re Cunard Steamship Co., Ld.* (1)

On June 29, 1908, the company issued a writ claiming—first, a declaration that the requirements of s. 14 of the Companies

(1) [1908] W. N. 160.

Act, 1900, had been duly complied with and that (*a*) the mortgages of the nine original ships, (*b*) the mortgage of the substituted ship *Brescia*, and (*c*) the mortgage of the new ship *Lusitania* did not require registration; secondly, an injunction to restrain the trustees from applying to register those mortgages; thirdly, if necessary, rectification of the particulars entered upon the register kept pursuant to the said section by adding the date of the resolution creating the series.

On June 30, 1908, a special case was stated under Order xxxiv. submitting the questions whether, having regard to the registration effected on December 22, 1903, and to the certificate under the hand of the Registrar of Joint Stock Companies bearing the same date, any and which of the following ship mortgages required registration under the Companies Act, 1900—namely, (*a*) the mortgages of the nine original ships, (*b*) the mortgage of the substituted ship *Brescia*, (*c*) the mortgage of the new ship *Lusitania*.

Maugham, for the company. The question turns mainly on the construction of s. 14 of the Companies Act, 1900. Sub-s. 1 provides (inter alia) that "A mortgage or charge for the purpose of securing any issue of debentures . . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured." Sub-s. 3: "The registrar shall keep, with respect to each company, a register in the prescribed form of all such mortgages and charges created by the company after the commencement of this Act, and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge." Sub-s. 4: "Provided that where a series of debentures containing any charge to the benefit

SWINFEN EADY J.
1908
CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

of which the debenture holders of that series are entitled pari passu is created by a company, it shall be sufficient to enter on the register—(*a*) the total amount secured by the whole series; and (*b*) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (*c*) a general description of the property charged; and (*d*) the names of the trustees, if any, for the debenture holders." Sub-s. 6: "The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with), and the company shall cause a copy of the certificate so given to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered." Sub-s. 7: "It shall be the duty of the company to register every mortgage or charge created by the company and requiring registration under this section, and for that purpose to supply the registrar with the particulars required for registration; but any such mortgage or charge may be registered on the application of any person interested therein." Sect. 18: "If any company makes default in complying with the requirements of this Act as to the registration of any mortgage or charge created by the company, the company and every director, manager, and other officer of the company, who knowingly and wilfully authorised or permitted such default shall . . . . be liable . . . . to a fine not exceeding one hundred pounds; and if any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock required by this Act to be registered, without a copy of the certificate of the registrar being endorsed upon it, he shall . . . . be liable . . . . to a fine not exceeding one hundred pounds." Sect. 30: "In this Act, unless the context otherwise requires . . . . The expression "debenture" includes debenture stock."

Now s. 14, sub-s. 4, must be read, "Provided that where a series of debentures containing *or having the benefit of* any charge to the benefit of which the debenture holders of

that series are entitled pari passu . . . . " ; and it is not necessary that the debentures should themselves contain a charge: *In re Harrogate Estates, Ld.* (1) This construction is to a certain extent adopted by s. 10, sub-s. 3, of the Companies Act, 1907 (7 Edw. 7, c. 50), which replaces s. 14 of the 1900 Act, and runs, "Where a series of debentures containing, or giving by reference to any other instrument, any charge . . . . " There is therefore no reason why s. 14, sub-s. 4, of the 1900 Act should not apply to debenture stock. Indeed, sub-s. 6, by requiring a copy of the registrar's certificate to be indorsed on every debenture "or certificate of debenture stock," and s. 18, by providing a penalty for the delivery of "any debenture or certificate of debenture stock required by this Act to be registered" without that indorsement, shew that debenture stock is included. In the present case the trust deed created a specific equitable charge both on the original and the new ships. The charge on the new ships attached the moment they were built: *Tailby* v. *Official Receiver.* (2) The particulars required by s. 14, sub-s. 4, except the date of the resolution, were supplied to the registrar. The date of the resolution ought to have been supplied, and the particulars can be amended if necessary under s. 15, but prima facie the registrar's certificate is conclusive that the requirements as to registration have been complied with: *In re Yolland, Husson & Birkett, Ld.* (3) The ship mortgages had, of course, to be executed and registered under the Merchant Shipping Act, 1894, but it was unnecessary to register them under the Companies Act, 1900. The specific equitable charge given by the trust deed was already registered. The formal legal mortgages were purely ancillary to this specific charge. The amount secured and the property charged were the same. The liquidator and creditors are not concerned with the formal documents necessary to complete the security. It is sufficient if they can ascertain the total amount secured, with a general description of the property charged and the other particulars under sub-s. 4. Registration under s. 14 is not intended to be a complete registration of title for the benefit of subsequent mortgagees. They would

(1) [1903] 1 Ch. 498, 503. (2) (1888) 13 App. Cas. 523.
(3) [1908] 1 Ch. 152.

SWINFEN EADY J.

1908

CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

not rely on the register, but would investigate the title in the ordinary way. The *Brescia* was not specifically charged by the trust deed, though it was subject to the floating charge over the assets. It was, however, substituted under clause 19 for the *Aurania*, which was specifically charged; and it is not necessary to register a substituted security: *Bristol United Breweries, Ld.* v. *Abbot.* (1) Unless this is so, a fresh certificate would have to be obtained from the registrar on every substitution and a copy indorsed on all the stock certificates. This course, though highly inconvenient, might be practicable in the case of stock certificates, as the owners are known, but it would be almost impossible in the case of bearer debentures, which are practically untraceable.

Kirby, for the trustees. The trust deed and the ship mortgages, which were absolutely necessary to complete the security, ought to have been registered under sub-s. 1. Sub-s. 4 was intended to prevent the necessity of registering seriatim a series of debentures containing or having the benefit of a charge. In such a case the registration of the particulars of the series under sub-s. 4 is sufficient: *In re Harrogate Estates, Ld.* (2) But it is very difficult to apply sub-s. 4 to debenture stock. It relates to a series of debentures, i.e., documents containing or having the benefit of any charge, which documents would prima facie have to be registered under sub-s. 1. This cannot apply either to the parcels of stock or the stock certificates. The latter, though documents, are in no sense debentures. They are merely evidence of title to a particular parcel of stock. It is the trust deed and ancillary mortgages that have to be registered under sub-s. 1, not these certificates. The fact that the registrar's certificate has to be indorsed on every debenture "or certificate of debenture stock" under sub-s. 6 does not shew that sub-s. 4 includes debenture stock, as it may quite well refer to sub-s. 1 (*a*), which may clearly be read, "A mortgage or charge for the purpose of securing any issue of debentures or debenture stock." The form of the certificate in the present case really shews that the registration was under sub-s. 1. In *In re Harrogate Estates, Ld.* (2) Buckley J. says: "As regards the certificate itself, it ought,

(1) [1908] 1 Ch. 279. (2) [1903] 1 Ch. 498, 504.

I think, to assume a different form according as the registration is made under sub-ss. 1, 2, and 3, or under sub-s. 4. If it be made under sub-ss. 1, 2, and 3, it will be a certificate of the registration of the particular mortgage or charge which is brought in for registration and is registered. If it be a case where registration is made under sub-s. 4, then the registrar ought to certify that there have been registered the particulars required by sub-s. 4 (*a*), (*b*), (*c*), and (*d*), inserting the particulars relevant to the case before him." The present certificate merely certifies that a mortgage or charge by way of trust deed dated December 3, 1903, and created by the company for securing 2,600,000*l.* debenture stock, was registered under s. 14. That is a certificate under sub-s. 1, not sub-s. 4. It is conclusive that the requirements of s. 14 were complied with on December 22, 1903, the date of the certificate, but it does not protect the subsequent mortgages. Suppose, however, that, notwithstanding the form of the certificate, the registration was really under sub-s. 4, and that registration of the covering deed without the mortgages essential to complete it was sufficient within that sub-section, the registration would still leave the *Brescia* mortgage unprotected. The *Brescia* was not specifically charged by the trust deed. It was substituted by the company for the *Aurania*, and the *Brescia* mortgage is altogether a new security. In *Bristol United Breweries, Ld.* v. *Abbot* (1) there was a mere sale and reinvestment by the trustees under the powers of the trust deed. The property never got into the company at all, and no new security was created. In the case of the *Brescia* the trustees had merely a general floating equitable charge, and the company gave them a specific legal mortgage. "In this way the trustees acquired for the first time a specific charge on the property in question, that is to say, a security of a different kind from that which previously existed," and the mortgage was therefore registrable: *Cornbrook Brewery Co.* v. *Law Debenture Corporation*. (2)

Maugham, in reply. The registration was intended to be made under sub-s. 4. The particulars were supplied for that very purpose. In *Cornbrook Brewery Co.* v. *Law Debenture*

(1) [1908] 1 Ch. 279. (2) [1904] 1 Ch. 103, 110.

SWINFEN EADY J.

1908

CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD

Corporation (1) the covering deed was executed before the passing of the Companies Act, 1900. It did not require registration, and was not registered under s. 14, sub-s. 1, nor were any particulars registered under sub-s. 4. It was therefore impossible to take advantage of sub-s. 4, and the new security had to be registered. In the present case particulars of the trust deed, which expressly provides for the substitution of securities, have been registered, and it is unnecessary to register the substituted security.

Cur. adv. vult.

July 18. SWINFEN EADY J. The first question which arises upon this special case is whether the debenture stock secured by the trust deed of December 3, 1903, is within s. 14, sub-s. 4, of the Companies Act, 1900. This sub-section relates to "a series of debentures containing any charge to the benefit of which the debenture holders of that series are entitled pari passu."

It was contended that in the present case there was not any creation of a series of debentures; that the holder of debenture stock was only entitled under the trust deed (see sched. 2, par. 6) to a certificate under the seal of the company stating the amount of the stock held by him, and referring to the trust deed; and that although by s. 30 of the Act the expression "debenture" includes debenture stock unless the context otherwise requires, yet the expression does not include a debenture stock certificate, which does not contain any admission of indebtedness or import any obligation or covenant to pay.

Previous to the decision of Buckley J. in *In re Harrogate Estates, Ld.* (2), it might have been contended that sub-s. 4 was limited to a series of debentures containing a charge, and each of which debentures would, but for that sub-section, have required to be registered under s. 14, sub-s. 1, and that it did not apply to debentures which did not contain any charge, and, therefore, did not require registration, although entitled to the benefit of a charge contained in some other duly registered instrument; and, moreover, that if the debentures did not contain a charge, but were only secured by a

(1) [1904] 1 Ch. 103, 110. (2) [1903] 1 Ch. 498, 503.

charge in some other instrument, that instrument could readily be registered like any other mortgage or charge under s. 14, sub-s. 1, and the question of the trouble and expense of separately registering each of a number of documents issued in a series would not arise.

In the case, however, to which I have just referred, Buckley J. considered s. 14 of the Act, and with regard to sub-s. 4 expressed himself as follows: "In this sub-section the words 'debentures containing any charge' are, I think, equivalent to debentures which have the benefit of a charge. The case in which the charge is contained in the covering deed only, and not repeated or extended by the debentures themselves, is, I think, within the sub-section." And this construction of the Act is adopted and given effect to by s. 10 of the Companies Act, 1907, which has now replaced s. 14 of the Companies Act, 1900. I must therefore treat it as settled that debentures which do not themselves contain any charge, but which are entitled to the benefit of a charge in some other instrument, are within sub-s. 4.

Again, the debenture stock holders in the present case are entitled pari passu to the benefit of the security contained in the trust deed. Clause 15 of the deed provides for the trustees applying the moneys received by them under the trust for conversion, first, in paying to the stockholders pari passu in proportion to the amount due to them respectively, and without any preference or priority, all arrears of interest remaining unpaid on the stock held by them respectively; and, secondly, in paying to the stockholders pari passu in proportion to the stock held by them respectively, and without any preference or priority on account of priority of issue or otherwise howsoever, all principal moneys due in respect of the stock held by them respectively, and that whether the same principal moneys shall or shall not then be payable.

So that in the present case there is the creation and issue of debenture stock the holders of which are entitled pari passu to the benefit of the charge created by the company.

Under these circumstances it would, in my opinion, unduly narrow the construction of the statute if I were to accede to the argument of the trustees. By s. 30 the expression "debenture"

SWINFEN EADY J.
1908
CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

includes "debenture stock," unless the context otherwise requires. What context is there in sub-s. 4 to exclude debenture stock? Debenture stock holders may be entitled to the benefit of a covering deed containing a charge in the same manner as holders of debentures not containing any charge may be so entitled; such debenture stock holders and debenture-holders may also equally be entitled pari passu; when once the notion is got rid of that to bring a case within sub-s. 4 the debenture must itself contain a charge, I see no reason for holding that sub-s. 4 has any context which requires the word "debentures" to be read as excluding debenture stock.

The issue of debenture stock in question amounts, in my opinion, to "a series of debentures" within the meaning of s. 14, sub-s. 4, of the Act.

This construction is assisted by sub-s. 6, which requires the company to indorse a copy of the registrar's certificate of registration on every "debenture" or "certificate of debenture stock" issued by the company, and the payment of which is secured by the mortgage or charge so registered.

The question remains whether the registration is insufficient because the date of the resolution creating the "series of debentures," i.e., debenture stock, was by inadvertence not inserted in the third column of the particulars. No doubt the entry on the register under sub-s. 4 ought to specify the date of the resolution creating the series. That is one of the requirements of the enactment. But, notwithstanding the omission to insert the date, the registrar issued his certificate that the statutory particulars had been duly registered. The certificate, under sub-s. 6 of s. 14, is conclusive: *In re Yolland, Husson & Birkett, Ld.* (1)

It follows from what I have said that the registration already made is sufficient to protect the ships named in the trust deed, and also the two ships of large size and high speed referred to in the trust deed, one of which is now known as the *Lusitania*, and that the ship mortgages of these ships do not also require to be registered under the Companies Act, 1900.

There remains the case of the *Brescia*. Clause 19 of the trust

(1) [1908] 1 Ch. 152.

deed entitles the company, with the permission of the trustees, to withdraw any of the specifically mortgaged premises upon substituting other property of a value equal to or greater than the value of the property proposed to be withdrawn, and under this power the company, with the permission of the trustees, has withdrawn the *Aurania* and substituted the *Brescia*, and a ship mortgage of the *Brescia* has been duly executed and registered at the Custom House. This mortgage is required to be registered by s. 14, sub-s. 1, of the Companies Act, 1900, unless the registration already made under sub-s. 4 is sufficient to protect it. The question whether registration under that sub-section is sufficient to protect a substituted security was raised before the Court of Appeal in *Cornbrook Brewery Co.* v. *Law Debenture Corporation* (1), but was not dealt with by the Court as there had not been any registration in that case, the covering deed having been executed before the passing of the Companies Act, 1900, Stirling L.J. saying: "Sub-s. 4 of s. 14 of the Companies Act, 1900, was referred to on behalf of the appellants; but, inasmuch as the requirements of that clause have not been complied with, it does not seem to assist them."

Now s. 14, sub-s. 4, requires only "(*c*) a general description of the property charged" to be entered on the register. A particular description, sufficient to identify each item or particular of property charged, is not required by the statute. Where part of the property specifically mortgaged is withdrawn, and other property substituted for it, in pursuance of a provision to that effect contained in the trust deed, I am of opinion that registration under s. 14, sub-s. 4, protects the substituted property as fully as the original property, and without any further registration under the Act. This seems to me to follow necessarily from *In re Yolland, Husson & Birkett, Ld.* (2), above referred to. Cozens-Hardy M.R. there explained the meaning and operation of s. 14, and added (3): "I cannot bring myself to doubt that it would be almost shocking if we held in this case that the certificate of the registrar, which is actually indorsed on each of these debentures, did not justify the debenture-holders in saying that they had, as against the

(1) [1904] 1 Ch. 103, 110. (2) [1908] 1 Ch. 152.
(3) [1908] 1 Ch. 160.

SWINFEN EADY J.
1908
CUNARD STEAMSHIP COMPANY, LIMITED v. HOPWOOD.

unsecured creditors represented by the liquidator, a perfectly good charge upon the assets of the company." Unless the registration under s. 14, sub-s. 4, protects the substituted security, a burden would be placed upon the debenture stock holders (who have already advanced their money and hold certificates from the registrar as to registration) to see that the mortgages or charges of the substituted security are duly registered under the penalty of losing their security in default of proper registration. The observations of Cozens-Hardy M.R. (1) as to the difficulty, if not impossibility, of debenture-holders proving that all the requirements of s. 14 have been complied with apply as regards substituted charges with even greater force than to the original charges. The debenture stock holders have not any notice of the substitution; it takes place without their assent or knowledge by arrangement between the company and the trustees, so that if in the present case all the ships were changed, as in the course of time they well might be, the debenture stock holders might lose the whole of their security for want of the registration of deeds executed after their title to their debenture stock was obtained, and notwithstanding the certificate of registration. In my opinion this proposition is quite untenable.

I therefore answer the questions in the special case by saying that none of the ship mortgages require registration under the Companies Act, 1900.

Maugham. The writ asks for rectification of the particulars if necessary.

SWINFEN EADY J. I do not think it is necessary.

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool; Norton, Rose, Barrington & Co.*

(1) [1908] 1 Ch. 158.

G. R. A.

SWINFEN EADY J.

1908

July 17, 29.

In re LANE.

BELLI *v.* LANE.

[1908 L. 577.]

Power—Execution—General Testamentary Power—Express Reference required—General Reference to all Testamentary Powers.

A fund was settled in trust for such persons as the settlor should by will "expressly referring to this power" appoint.

By her will the settlor gave and devised the residue of her estate, both real and personal, of which she should die possessed or entitled to "and over which I shall have any power of disposition by will" to certain beneficiaries:—

Held, that this was a sufficient reference to execute the power.

In re Waterhouse, (1907) 96 L. T. 688; 98 L. T. 30, and *In re Rolt*, [1908] W. N. 76, applied.

Phillips v. *Cayley*, (1889) 43 Ch. D. 222, and *In re Teape's Trusts*, (1873) L. R. 16 Eq. 442, distinguished.

ORIGINATING SUMMONS.

By a settlement dated April 6, 1899, and made between the settlor of the one part and trustees of the other part, a sum of 2800*l.* Imperial Continental Gas Association stock was settled upon trust for the settlor for life, and after her death as to five fourteenth parts thereof in trust for her son Herbert absolutely; and as to the remaining nine fourteenth parts (subject to the payment of certain expenses), "In trust for such person or persons and for such purposes as she shall by will or codicil made after the date hereof and expressly referring to this power or the property subject thereto appoint," and in default of appointment upon the trusts therein declared.

By her will, dated May 25, 1907, the settlor disposed of her residue as follows: "I give and devise the residue of my estate and effects both real and personal of which I shall die possessed or entitled to and over which I shall have any power of disposition by will" to certain beneficiaries. The testatrix died on September 23, 1907.

This summons was issued to determine whether the power of appointment was exercised.

SWINFEN EADY J.
1908
LANE, *In re.*
BELLI *v.* LANE.

W. M. Hunt and *Stiebel*, for the trustees of the settlement.

Harman, for the beneficiaries claiming under the will. The gift of property "over which I shall have any power of disposition by will" is an express reference to the power or the property within the meaning of the settlement: *In re Waterhouse* (1); *In re Rolt*. (2) *Phillips* v. *Cayley* (3) is distinguishable, as in that case the will did not refer to any power at all, and it was merely held that a general testamentary power requiring express reference was not a power to appoint in any manner the testator might think proper within s. 27 of the Wills Act (1 Vict. c. 26), and was consequently not executed by a general bequest.

Micklem, *K.C.*, and *Rolt*, for a person entitled in default of appointment. Apart from authority, it is quite clear that the will does not expressly refer to the power or the property. The words "over which I shall have any power of disposition by will" are mere surplusage, as they are practically inserted in every general devise and bequest by s. 27 of the Wills Act. It is clear that a general devise or bequest alone would not be an execution of this power under s. 27: *Phillips* v. *Cayley*. (3) Why should the insertion of a general reference already implied by the statute make any difference? Again, if the words "over which I shall have any power of disposition by will" are an express reference to every power a testator possesses, they would be an express reference to limited as well as general powers. In that case the elaborate arguments and judgment in *In re Teape's Trusts* (4) would have been quite unnecessary. It would have been sufficient to say that the words "or over which I may have any power of disposition or control" were an express reference to all powers, including the limited power, whereas the arguments and judgment turn on the intention to be derived from the whole instrument, and the fact that the testator had no power except the limited power to which the words could refer. This view is supported by the head-note, which states that the will contained no reference, i.e., express reference, to the power. Similarly in *In re Hayes* (5) a gift of "all the residue of the property over which at the time

(1) 96 L. T. 688; 98 L. T. 30.
(2) [1908] W. N. 76.
(3) 43 Ch. D. 222, 232, 233.
(4) L. R. 16 Eq. 442.
(5) [1901] 2 Ch. 529.

of my death I shall have a disposing power" did not execute a limited power created between the will and the death, though the testator was aware of the creation of the power and allowed the will to stand. These and many other cases of limited powers by implication decide that a general reference to powers, though including a limited power, is not an "express reference" sufficient to execute it, but that other indications of intention are necessary. The same principle should be applied to a general power requiring "express reference." In *In re Waterhouse* (1) it was necessary that the will should "expressly purport to exercise" the power. The will, in fact, expressly purported to exercise all powers, and it was held that the power was exercised. That is no authority for the present case, where an express reference to the power or the property is required. So far as *In re Rolt* (2) decides that a general reference is an express reference, it is really inconsistent with the authorities on limited powers.

Swinfen Eady J. The short question raised by the summons is whether the settlor's general testamentary power over nine fourteenths of the settled fund was exercised by her will, or whether the nine fourteenths devolved as unappointed.

By the settlement of April 6, 1899, the nine fourteenths were to be held after the settlor's death "In trust for such person or persons and for such purposes as she shall by will or codicil made after the date hereof and expressly referring to this power or the property subject thereto appoint," and in default of appointment over. By her will made after the date of the settlement the settlor gives and devises the residue of her estate and effects, both real and personal, of which she shall die possessed or entitled to "and over which I shall have any power of disposition by will" to certain beneficiaries. There has been no attempt to draw any distinction between the copulative "and" used in the above clause and the disjunctive "or" sometimes used. The question is whether the power has been exercised.

Several authorities closely resembling the present case have been referred to.

In *In re Waterhouse* (1) the survivor of certain persons was given

(1) 96 L. T. 688; 98 L. T. 30. (2) [1908] W. N. 76.

SWINFEN EADY J.
1908
LANE, *In re.*
BELLI v. LANE.

a general testamentary power of appointment with a proviso that "no will of such survivor shall be deemed an exercise of the power aforesaid, unless it expressly purports to exercise such power." The survivor bequeathed her residue in these words: "I give and bequeath all the residue of the personal estate of which I shall be possessed at the time of my decease or over which I have or shall have any disposing power" upon certain trusts. Joyce J. held that the power was exercised, and his decision was affirmed by the Court of Appeal, Cozens-Hardy M.R. saying, "It seems to me that was a will which expressly purported to exercise such power." That case closely resembles the present case, and it is a decision of the Court of Appeal, by which I am bound.

It is contended that there is a distinction between "expressly purporting to exercise" and "expressly referring to" a power. In *In re Rolt* (1), however, the language was almost identical with that of the present case. A sum of money was settled in trust for such persons as the donee of the power should by any will or codicil "expressly referring to the present power" appoint. The donee bequeathed "all the rest residue and remainder of my real and personal estate not hereby or by any codicil or otherwise specifically disposed of and which I can dispose of by will in manner I think proper either as beneficially entitled thereto or under any general power" to certain persons.

Warrington J. held that the reference to "any general power" was an express reference to the power in question. The present case is absolutely undistinguishable.

Phillips v. *Cayley* (2) was relied on as an authority the other way. In that case railway stock was settled upon trust for such persons as the settlor should "by a will or codicil expressly referring to this power appoint." The settlor bequeathed his personal estate to trustees without referring to any power, and it was held that the bequest did not operate as an execution of the power under s. 27 of the Wills Act.

Cotton L.J. said: "The object of s. 27 is . . . . to make a general disposition in a will operate as an exercise of a power to appoint by will in any manner the testator thinks fit, though

(1) [1908] W. N. 76. (2) 43 Ch. D. 222, 232, 233.

the testator does not expressly shew that he has an intention to execute that power. . . . . But then we must see whether the will is such as to come within the power, and, in my opinion, if there are any conditions or limitations imposed by the settlement creating the power, to which the Act does not prevent effect being given, we cannot disregard them. Now the Act(1) in express terms prevents regard being had to any conditions attempted to be imposed as regards the mode of execution, but it does not refer to any other conditions. In the present case the settlor says in effect: 'My settlement may be put an end to, and the property may be otherwise disposed of, by a will expressly referring to this power.' Any other will—a will not expressly referring to the power—is not within that description, and as there is nothing in the Act to prevent such a condition being imposed I cannot see how under s. 27 this will can be said to be a good execution of the power."

Bowen L.J. said: "It is obvious that in the present case the will does not answer to the description given in the power, and that is a fatal reason why the section does not apply. The statute is not intended to cure dissimilarities between wills and powers. . . . ."

In re Teape's Trusts (2), a case of a limited power, was also relied on to shew that the words "over which I shall have any power of disposition by will" were not an express reference to the settlement power. But on this point I adopt the answer of Cozens-Hardy M.R. in *In re Waterhouse* (3), where he says: "I do not feel the necessity of considering the authorities which were cited dealing with special powers, because it seems to me to depend on entirely different considerations."

In these circumstances I determine that the will is a valid exercise of the power, and the nine fourteenths devolve according to the will.

Solicitors: *Cecil John Mercer; Meredith, Roberts & Mills, for Baker & Co., Weston-super-Mare.*

(1) See s. 10. (2) L. R. 16 Eq. 442.
(3) 96 L. T. 688; 98 L. T. 30.

WARRINGTON J.

1908

July 13, 14, 15, 16.

FARQUHAR *v.* NEWBURY RURAL DISTRICT COUNCIL.

[1907 F. 876.]

Right of Way—Highway—User by Public—Dedication—Land in Settlement—Possibility of Dedication—Tenancy for Life with Remainder in Fee—Presumption—Acquiescence.

Where land is in settlement and limited to a tenant for life with remainder to a tenant in fee, both of whom are sui juris, and no other persons are interested, it is possible for the tenant for life and remainderman together to dedicate to the public a road over the land; therefore where land was thus settled and was under the control and management of the remainderman, and a road over it was laid out by him and was used by the public in such a way as would have compelled the Court as against an owner in fee to infer dedication, and the remainderman, after the death of the tenant for life and after a further settlement, acquiesced in this user, the Court drew the inference that the road had been dedicated to the public by the tenant for life and remainderman.

Action for a declaration that a roadway across the Shaw estate, near Newbury, was not a public highway.

Since the year 1632 the villages of Shaw and Donnington had formed one parish with one church, St. Mary's, which was close to Shaw House and the village of Shaw. The rectory house and garden lay between the church and Shaw village and on the south side of a lane which ran from Shaw village past the church and across the park of Shaw House into a public highway called Love Lane. Love Lane was the high road from Shaw to Donnington. Shaw House and gardens and some farm buildings stood on the north side of the lane and between it and Love Lane. The plaintiff, who bought Shaw House in 1905, admitted that the inhabitants of Shaw and Donnington were entitled to use the lane as a churchway for church purposes, but denied that the public had any right to use it, and in order to assert her right she locked two gates which stood across the lane. The Newbury Rural District Council disputed her right to close the lane and removed the locks, and one Ferris also interfered with the gates, whereupon the plaintiff brought this action against the council and him.

It appeared that there was no roadway across the park previously to 1753, and that from that date till 1895 the Shaw estate was in settlement, and dedication was therefore, according to the plaintiff's contention, impossible. In 1836 a Dr. Penrose was tenant for life under the settlement, and Henry Richard Eyre was tenant in tail in remainder. In that year H. R. Eyre disentailed and limited the estate subject to Dr. Penrose's life interest to himself in fee, and in 1849 he resettled it on his marriage. From 1836 to 1849 Dr. Penrose never resided at Shaw House, and H. R. Eyre managed the property. In 1842 he laid out the new road, now in dispute, across the park from the church to Love Lane in a somewhat different line from that of the old track, and he subsequently acquiesced in the use of it by the public. It was not proved that Dr. Penrose had any knowledge of this user. The effect of the evidence is stated in the judgment of Warrington J.

Rowden, K.C., Radcliffe, K.C., and *Whinney*, for the plaintiff. We admit the existence of a churchway, and that the inhabitants of Shaw and Donnington have a right of way to St. Mary's Church for church purposes, but we contend that there is no public highway over this road. All the acts of user which have been proved in this case are referable to the existence of a churchway or were done by tenants of the estate. Our title is admitted subject to the establishment of the public right by proof of user, and no specific act of dedication is alleged. Prima facie a churchway is not a highway; it belongs to the particular inhabitants of the parish: Bacon's Abridgment, 7th ed. vol. iv. p. 215; Cruise's Digest, 4th ed. vol. iii. p. 85; *Batten* v. *Gedye*.(1) Dedication of a highway must be to the public generally; a right to a churchway is a customary right of user by the parishioners for church purposes, and the public have no right to use it: *Thrower's Case* (2); *Brocklebank* v. *Thompson*.(3)

To establish a right of way it must be shewn that it has been used openly as of right and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using

(1) (1889) 41 Ch. D. 507. (2) (1672) 1 Vent. 208.
(3) [1903] 2 Ch. 344.

WARRINGTON J.
1908
FARQUHAR v. NEWBURY RURAL COUNCIL.

it, and from this apparent acquiescence of the owners the Court can draw the inference that they chose to consent, in which case there would be a dedication: *Greenwich Board of Works* v. *Maudslay.* (1) It was impossible for the plaintiff's predecessors to distinguish between user of the churchway and public user, so no such inference can be drawn in this case. Whether the user should be referred to a lawful origin rather than to a series of trespasses is a question to be determined after consideration of the whole of the evidence: *Turner* v. *Walsh.* (2) There must be an intention to dedicate, and a single act of interruption by the owner is of more weight than many acts of enjoyment: *Chinnock* v. *Hartley Wintney Rural Council.* (3) The presumption of dedication is rebutted by the circumstance that gates were placed across the road: *Rex* v. *Lloyd.* (4) The fact that the defendants repaired the road is not conclusive: *Reg.* v. *Hawkhurst.* (5)

From 1753 to 1895 this property was in settlement, and no dedication was possible, nor can it be inferred: *Reg.* v. *Inhabitants of East Mark* (6); *Reg.* v. *Petrie* (7); *Roberts* v. *James.* (8) Before 1753 the evidence shews that there was no road in existence, so it cannot be presumed that there was any dedication before that date. From 1891 to 1905 the whole of the property over which the road passes was demised to a tenant, so there could be no dedication during that time. A person cannot dedicate more than he owns: *Attorney-General* v. *Antrobus.* (9) A lessee for years cannot dedicate without the consent of the owner in fee: *Wood* v. *Veal* (10); *Winterbottom* v. *Lord Derby* (11); and during the lease the reversioner cannot interfere to prevent trespass or, as in this case, to stop other people from repairing the road: *Baxter* v. *Taylor* (12); *Corsellis* v. *London County Council.* (13) The defendants must shew that part of this road was dedicated by the rector of the parish, but he had no power to

(1) (1870) L. R. 5 Q. B. 397, 404.
(2) (1881) 6 App. Cas. 636, 642.
(3) (1899) 63 J. P. 327.
(4) (1808) 1 Camp. 260.
(5) (1862) 7 L. T. 268.
(6) (1848) 11 Q. B. 877.
(7) (1855) 4 E. & B. 737.
(8) (1903) 89 L. T. 282.
(9) [1905] 2 Ch. 188, 202.
(10) (1822) 5 B. & Al. 454.
(11) (1867) L. R. 2 Ex. 316.
(12) (1832) 4 B. & Ad. 72.
(13) [1907] 1 Ch. 704.

do that: *Barker* v. *Richardson*. (1) [On the question of admitting as evidence an old map, referred to as the "Chandos plan," they cited Taylor on Evidence, 10th ed. p. 441, par. 622.]

Cripps, K.C., *Macmorran*, K.C., and *George Henderson*, for the Newbury Rural District Council. The evidence of dedication is complete. The acts of user proved are quite inconsistent with this road being a churchway; it is a public highway.

[WARRINGTON J. I agree that the evidence has been too wide to prove the existence of a churchway; it is a public highway or nothing.]

Then the question depends on the fact that the property was in settlement. To rebut the presumption of dedication the plaintiff must shew that dedication was impossible after 1753, and she has not done so: *Powers* v. *Bathurst*. (2) A tenant for life and a tenant in fee in remainder can together dedicate a road to the public, or a tenant for life can dedicate and the tenant in fee can acquiesce in the dedication when he comes into the estate. That is what happened here. From 1836 to 1849 Dr. Penrose was tenant for life and Mr. H. R. Eyre was tenant in fee in remainder. Dr. Penrose lived elsewhere; Mr. Eyre lived at Shaw House and himself laid out the new road and acquiesced in its use by the public; and the Court will assume from the evidence of user that he and Dr. Penrose dedicated it to the public. There is no legal principle which makes the presumption of dedication more difficult against two persons than against one. The important thing to prove is dedication by the owner in fee.

Devonshire, for the defendant Ferris, took no part in the argument.

Radcliffe, K.C., in reply. The suggestion that dedication can be presumed because it was possible by a tenant for life and a tenant in fee in remainder would apply in all cases where the persons interested under the settlement were sui juris, however numerous they might be. This has never been held or even suggested before the present case, and is directly contrary to the decisions in *Roberts* v. *James* (3) and *Attorney-General* v.

(1) (1821) 4 B. & Al. 579. (2) (1880) 49 L. J. (Ch.) 294.
(3) 89 L. T. 282.

WARRINGTON J.
1908
FARQUHAR v. NEWBURY RURAL COUNCIL.

Antrobus. (1) The rule is that, even if it is shewn that the reversioner in fee was willing to dedicate, it must also be shewn that the tenant for life agreed. No such agreement is shewn here. The tenant for life did not even live at Shaw House, and there is no evidence that he knew anything about the road. Dedication must be of the whole right and must be made at one time. There cannot be a dedication of part of the right at one time and of the rest of the right at another time. There cannot be a presumption of an inchoate dedication subsequently matured; there must be a presumed complete dedication at one and the same time: *Turner* v. *Walsh.* (2) When Mr. H. R. Eyre resettled the estate in 1849 he was still entitled in remainder only, so that acquiescence by him after the death of the tenant for life could not bind the estate as against the new remainderman. He never was tenant in fee in possession.

WARRINGTON J. The question in this case is whether a certain road which runs in a westerly and then in a northerly direction in front of a house belonging to the plaintiff, called Shaw House, near Newbury, is or is not a public road. The plaintiff, who has recently purchased the property of which Shaw House forms part, insists that the road is a private road, subject to a right, which she admits, for the parishioners of a place called Shaw on the one hand and the inhabitants of a place called Donnington on the other, which two places since the year 1632 have formed one parish, to come to the parish church, which lies a little to the north of about the centre of the road. I think the real question which I have to determine is rather one of law than of fact, having regard to the fact that, speaking generally, and only speaking generally, the estate on which the right is claimed has been in settlement since the year 1753.

The facts are these. I will first state the topography of the place as it exists now, and then the history of this road so far as we have been able to ascertain it. Shaw House is an ancient house, I believe dating from the reign of Elizabeth at all events, lying on the north side of and near to the town of Newbury. A little to the south-east of Shaw House is the village of Shaw, and

(1) [1905] 2 Ch. 188. (2) 6 App. Cas. 636, 642.

from that village there runs a lane to the north-west, having the rectory garden on its south-west side and an enclosure on the north-east. This lane is admittedly—and that is of importance—a public road as far as the north-eastern corner of the rectory grounds. At and from that point, at which there is now and has for a considerable time been a gate, the road runs to the west, past the rectory garden on the south and past the garden of Shaw House on the north, and after leaving the rectory garden continues in the same direction south of St. Mary's Church and churchyard, turns round to the north-west as it passes the churchyard, a little farther to the north some distance on, and runs out into a public highway called Love Lane, which runs from east to west along the north side of Shaw House, gardens, and park. Where it runs out into Love Lane there is, as there is at the other end, and has been always so far as the evidence goes, a gate. Now it is important to notice that this road which is claimed as a public road is one which in fact joins two public roads. It runs from the end of the public lane which I have already referred to on the one side and it runs out into Love Lane on the other side. Love Lane is a lane by which communication is had between Donnington, the other of the two villages or hamlets of which the church is the parish church, and the church. That is the state of things as it at present exists.

Now what has been the condition of things in earlier days? Before 1842 the road did not run in the same direction as it does now, nor was it in the same condition, but the public lane up to the gate by the rectory garden was as it is now. There was, as now, a road running along the south of the grounds of Shaw House to the north-east corner of Shaw churchyard, and there was a road—1836 is the earliest record I have of it—or track of some sort—I will say what it was in my opinion presently—running across the park belonging to Shaw House, and running out into Love Lane at the spot where the present road runs into Love Lane. That appears from a plan of that date to have been the state of things in 1836, and a tithe plan of 1840 or thereabouts leads to the same conclusion. Two old maps of the middle of the eighteenth century have been put in

WARRINGTON J.

1908

FARQUHAR v. NEWBURY RURAL COUNCIL.

evidence. One of them is an old estate plan made when the first Duke of Chandos was the owner of the estate. He became the owner in 1743 by conveyance; he contracted to buy some considerable time before, but he became the owner by conveyance in 1743, and he sold it again in 1751. So I think I may safely conclude that the first of these two old maps dates from somewhere between 1743 and 1751. Now that old map corresponds with great accuracy with the facts as we know them in the later maps, and I may take it, and do take it, as an accurate representation of the locus in quo. That map shews a road, whether public or private of course cannot be determined from the map, but it shews a road running from the end of the lane which I have mentioned to the north-east corner of the churchyard and for a short distance further on, at which last point there is a gate shewn on the map leading into the park, and there it stops. There is no track from that gate across the park such as is shewn in the plan of 1836 and in the tithe plan of 1840, but it does shew that persons coming from Donnington and wanting to go to church could have come straight down through the farmyard situated to the west of Shaw House and thence by the west side of Shaw House. The conclusion that I draw from that map is that at that time, between 1743 and 1751, there was no road across the park in the position in which the road is shewn in the map of 1836 and the map of 1840, and that people coming from Donnington must in those days have come down through the farmyard. Then there is a map which has also been put in evidence which is dated 1761, Rocque's survey of Berkshire, which is on a considerable scale, rather more than an inch to a mile. That was some ten years later than the latest date at which the Chandos map could have been made. It is on a scale a good deal smaller, but, notwithstanding that, the topography as shewn by that map agrees in most details not only with that shewn by the map of 1743–51, but with the more modern maps. That map also shews a road coming from the village of Shaw past Shaw House, and then opening out (the churchyard is not shewn as a separate enclosure) into an enclosure which contains the church and churchyard, the farmyard, and the site occupied by the buildings, with the park on its

west side. That map again shews no track across the park, and the conclusion that I come to, therefore, is that down to some period subsequent to 1753 there was no way across the park on the Donnington side, but that there was a way, whether public or private is another matter, to the church from Shaw in front of Shaw House, which way also went out into the farmyard and the homestead, and there was thus a possibility of the inhabitants of Donnington getting to the church through the farmyard. So far my findings would be in favour of the plaintiff on a point to which I shall presently allude.

Now in 1840 there was a road, just as it is now, or very nearly but not quite, on the site of the present road from Shaw as far as the north-east corner of the churchyard. It is not quite on the same line, as I shall shew presently. From that point, after passing through a gate at the corner of the churchyard, the road ran in a westerly direction, then turned round to the north and went out into Love Lane, very much as it does now, and in the same place. Whether at that time—that is to say between 1836, when the earlier map to which I have alluded was made, and the time when the events which I am about to mention took place—whether that road was anything more than a track across a field may be in doubt. On the evidence, I doubt myself whether there was anything more than a mere wheel track across and through the park. Not only have several of the old witnesses said so, but the position of that part of the road was obviously indeterminate, because the map of 1836 does not shew it in the same direction as the tithe map of 1840. In 1841 the old Shaw church was pulled down and a new church was built, and the road as it then existed was diverted. Instead of running from Shaw to the north-east corner of the churchyard, the road was constructed so as to come round the south side of the churchyard, pass up near the western side, and join Love Lane in the direction in which it runs now. That alteration was made by Mr. Henry Richard Eyre, and that is a fact which is of great importance. That alteration was made in 1842 by Mr. Henry Richard Eyre, and the new road was made up as a defined gravelled road. It was not fenced when first made. It ran through the open park ; it was closed at both ends by at first

WARRINGTON J.
1908
FARQUHAR v. NEWBURY RURAL COUNCIL.

ordinary farm gates and afterwards by heavier swing gates of a park-gate nature, gates which would latch by themselves as they swung, and which were furnished with locks. I find as a fact that those gates, though often and generally closed, because since 1861 they closed automatically, were not during this period locked; not until, during quite recent years, they were locked once a year with the view of asserting a right to keep them locked against the public.

Now that road so made up has ever since that period been used by any one who desired to use it on foot or horseback, in carriages, and with carts and waggons. I think the result of the evidence both of the defendants and the plaintiff goes to that. So far as the evidence of the plaintiff's own witnesses is concerned it is hardly necessary to refer to any except that of the rector, Canon Nelson, who has been there since 1872. He said that the road past the church was used for all purposes until the traction engines and motors, and so on, came, and then there was an attempt to stop them. That agrees with the evidence given by other persons who speak to a period more or less earlier. There are several witnesses, one an old man of ninety-three, another an old lady of seventy-eight, who speak to the user of the road not only since the new road was made, but in the earlier period, and I have no doubt (I need at the present moment say nothing about the period prior to the construction of the new road) that from the construction of the new road in 1842 there has been a user of that road by anybody who desired to use it for all purposes for which they desired to use it. Attempts were made to shew that that user had only been by tenants of the Shaw estate or by persons who may be presumed to have had the permission of the owner of the Shaw estate, but those attempts, in my opinion, utterly broke down. There is no evidence of anybody ever having asked permission or of any permission ever having been given, and there is no evidence of any interruption in the sense of a physical interruption on the part of the owners of the house until the recent locking of the gates to which I have referred, and which has really no bearing on the case. There was some evidence that subsequently to 1876, the date of the death of Henry Richard Eyre, objection had been raised to certain classes

of traffic, on one occasion to a flock of sheep going through, on another occasion to a traction engine with a waggon behind it, but even then there was no physical obstruction; there was nothing more than an application, in some cases acquiesced in, but in no case amounting to an actual physical obstruction of the road or anything that would bring to the knowledge of the public that their rights, if they existed, were being interfered with. The matter does not stop there. Henry Richard Eyre, to whom I will refer again presently when I come to the title, who was in possession of the estate for a considerable number of years, regarded it as a public road. That I think is proved beyond all question. He is proved, on an occasion which led naturally to the remark, to have said that he regretted that he had a public road running as this did round his house. I think there is no doubt that Henry Richard Eyre, for what it is worth, regarded this as a public road. The road has from time to time been repaired and kept in order by the parish authorities. That I think is proved. There are two entries in the books of an earlier surveyor of highways, one in 1859 and the other in 1861, of work being done on the road, and there is then a gap in the books. Again in 1892 and succeeding years there are frequent entries of work being done on the road and paid for by the public authority, and that has been proved also by witnesses who have actually themselves done the work on the road and been paid by the highways department. The road, therefore, was treated as one of the parish roads. There is one other fact which I must mention, because it to some extent explains what at first sight would appear to be rather odd, namely, that the lane from Shaw to the gate by the rectory is admitted to be public, whereas the rest of the road is not. That fact is this, that from the east side of the gate there ran prior to 1851 a public road, which has been referred to in these proceedings as the Hollow Road, which ran from there and joined Love Lane, and therefore made a way for persons living at Shaw to go round to Donnington by a public road without resorting to the road past the church; but it was a very bad road, not nearly so good a road as the one past the church, and it was uphill. I mention that point for this reason: so far as it goes it is a point favourable to the

WARRINGTON J.
1908
FARQUHAR v. NEWBURY RURAL COUNCIL.

plaintiff, because it explains how it might be—not how it is, but how it might be—that the lane up to the gate is public, whereas the road beyond might be a private road. But beyond that it is of no importance. What is important in connection with it is this, that on January 10, 1851 (and that date is important), Mr. Henry Richard Eyre signed a minute in the vestry book the effect of which was to record an arrangement whereby that road should be closed; a footpath in place of it was made through a field which adjoined it, and what had been a private occupation road—a continuation of Love Lane—turned for the future into a public road. Henry Richard Eyre, therefore, was a party to the arrangement, and he was a party to it on January 10, 1851.

The result of what I have stated is this, that if during the period between 1842 and the present time it was possible that the owners could have dedicated the road now in dispute to the use of the public, the Court is bound to conclude it was dedicated.

Now the answer to that case is, on the part of the plaintiff, that having regard to the title of the estate there was no owner who could have dedicated the road to the public between the year 1753 and a year or two ago, a period from which down to the present time there is no suggested dedication. First of all I must say a word or two about the law. The law appears to be this: that continued user by the public of a way raises a presumption that that way belongs to the public, that it has been dedicated by the owner for the public use for which it has been used, and, further, that it is not incumbent upon the public to shew by what particular owner the road had been dedicated. If dedication is possible dedication will be assumed. But it is open to the owner of the soil to establish that owing to the condition of the title dedication was not possible, and if he shews that, then the presumption which results from the continued user is rebutted. But he must shew that the dedication was impossible. That again is subject to one qualification, which is this: that, notwithstanding it is shewn that for a long period dedication has been impossible, it is open to the Court to infer, if the facts will justify that inference, that dedication may have taken place, and, if it may have taken place, that it

did take place before the period during which that impossibility continued. So far as this case is concerned, if I were driven to say whether I must infer a dedication anterior to the year 1753, I should hold that the evidence does not satisfy me that it would be possible to make that inference. I think, having regard to the old maps, the state of things was such that I could not draw the inference from the evidence of modern user and user prior to 1753, and therefore I could not draw the inference of dedication prior to that date. So far, therefore, the only question I have to consider is whether the plaintiff has made out in fact that dedication was impossible during the whole of the period from 1753 to practically the present time.

Now the state of the title was this. The estate was put in settlement in the year 1753, and from 1753 to 1836 there was no possibility of dedication taking place, the estates being tenancies for life, sometimes estates tail in possession, sometimes tenancies for life, followed by estates tail with ultimate remainder in fee. In 1836 a Dr. Penrose was tenant for life with remainder to the gentleman I have already mentioned, Mr. Henry Richard Eyre, in tail. In that year, 1836, Mr. Henry Richard Eyre disentailed and limited the estate, subject to the life interest of Dr. Penrose, to himself in fee. At that date, therefore, the estate simply stood limited to Dr. Penrose for life with remainder to Henry Richard Eyre in fee, and the tenant for life and the tenant in fee together could undoubtedly have dedicated this lane to the public. There was nobody who was not sui juris; there were no heirs in tail that could succeed; there was nobody but the tenant for life, Dr. Penrose, followed by the estate in fee of Mr. Henry Richard Eyre. That state of things continued until the year 1849, when Mr. Henry Richard Eyre on his marriage resettled the estates. Dr. Penrose was still alive in 1849 (he died on February 8, 1851), and the estate then stood settled to Dr. Penrose for life with remainder to Henry Richard Eyre for life and remainder to his widow, if she survived, for life, with remainders over. Now the life estates under that settlement continued until the year 1895, when the widow of Henry Richard Eyre released her life estate, and from that date the estate was vested in the eldest son of Henry Richard Eyre,

WARRINGTON J.
1908
FARQUHAR v. NEWBURY RURAL COUNCIL.

namely, Henry John Andrews Eyre, in fee, and so continued till it was conveyed to the present plaintiff. But from a date anterior to 1895 the estate was in lease and was in the possession of the lessee, and therefore no acts of user during that period would bind the fee. The real question arises as to the state of things between the year 1836 and the year 1849.

Was there then a possibility of the estate being dealt with? I think there was. Where a tenant for life is in possession of the estate, just as where a lessee is in possession, if the Court had nothing but the acts of user taking place during that time, it may be that it could not bind by that the tenant in fee; but in this case there is no such difficulty. Though the tenancy for life of Dr. Penrose continued until 1851, the real possession and control of the estate, so far as there was any on the part of anybody, was in the tenant in fee, in Henry Richard Eyre. It was Henry Richard Eyre who set out the new road in 1842; it was Henry Richard Eyre who on January 10, 1851, in the lifetime of Dr. Penrose, the tenant for life, consented to the setting out of the new road in place of the Hollow Road; it was Henry Richard Eyre, and not the tenant for life, who in conjunction with the rector laid out shrubberies and grounds in 1841 or thereabouts in the neighbourhood of the house; it was Henry Richard Eyre who, after the determination of the tenancy for life, acquiesced in the continued user by the public in the way which I have mentioned.

It seems to me, therefore, that even if it would have been possible for the tenant in fee, being only tenant in fee in remainder, to have made use of the existence of the tenant for life in order to prove, not that there was no possibility of dedication, but that there had been no dedication which bound him during that period, Mr. Henry Richard Eyre would have been debarred from doing so, because his acts point to this: that he knew what was being done, that he was actually so far a party to it that he laid out the road himself, and that after it had been done he acquiesced in the continued user by the public of the road in the manner in which it was used.

I think, therefore, to sum up what I have said, that but for the plea that there was no possibility of dedication the public

have established their right; that the plea that there was no possibility of dedication has broken down, because it has been shewn that during a part of the period of user there was a tenant in fee and a tenant for life, who together could have dedicated; and then, further, that any case founded on the existence of the tenancy for life as against the tenancy in fee is defeated by the fact that Mr. Henry Richard Eyre, although there was a legal tenant for life, was the person who was really in possession and control of the estate, and who subsequently acquiesced in what had been previously done. I think, therefore, that the public in this case have established their right to the use of the road in question, and that the only thing I can do is to dismiss the plaintiff's action. There is no counter-claim, and, this being an action against a public authority, I must, under the Public Authorities Protection Act, direct the plaintiff to pay the costs of the defendants as between solicitor and client. The plaintiff may maintain the gates at either end of the road, but must not lock them. It has been arranged that, the defendant Ferris undertaking not to break open or otherwise interfere with the gates unless locked, except so far as is necessary in the lawful exercise of his rights, there should be no order as to costs in his case.

Solicitors: *Radcliffe, Cator & Hood; Rawle, Johnstone & Co., for S. V. Pinniger, Newbury; G. G. Leader.*

H. C. R.

WARRINGTON J.

1908

June 17, 18, 19, 20; *July* 31.

MAYOR OF WESTMINSTER *v.* RECTOR AND CHURCHWARDENS OF ST. GEORGE, HANOVER SQUARE.

[1905 W. 1171.]

Burial Ground—Vested in Rector and Churchwardens—Part consecrated and used as Cemetery—Part unconsecrated and used as Site for Houses—Closed by Order in Council—Right to administer Income of Houses—Vestry—Parish—Borough Council—Power relating to Affairs of Church—Church Property—Burial Act, 1857 (20 & 21 *Vict. c.* 81), *s.* 24—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *ss.* 4, 23.

The functions of the vestry of St. George, Hanover Square, were twofold, first in relation to the affairs of the church, secondly in relation to secular affairs. In 1757 the vestry bought land for the purpose of a burial ground, the purchase-money being provided out of ecclesiastical funds. By a private Act of Parliament this land was vested in the vicar and churchwardens of the parish for the use of the inhabitants of the parish as a burial ground. The rector and his successors were to take the burial fees. Part of the land was consecrated in 1765 and used as a burial ground and a site for a chapel; the rest remained unconsecrated. In 1767 and 1768 the rector and churchwardens, acting under the direction of the vestry, granted building leases for ninety-nine years of the unconsecrated land. The ground rents were received by the churchwardens and accounted for by them as part of the revenues of the church. In 1854 the burial ground was closed by an Order in Council pursuant to the Burial Act, 1852, and a burial board was constituted for the parish with a new burial ground. From 1854 to 1865 the ground rents were paid to the burial board. The building leases then fell in, and the rector and churchwardens, acting under the direction of the vestry, renewed the leases for twenty-one years at increased rents, and from that time the rents were collected by the vestry clerk, paid to the management account of the vestry, and applied as part of the ordinary revenues of the parish. In 1900 the buildings were pulled down and fresh building leases were granted. The council of the city of Westminster claimed to be entitled to administer the income of the property for the benefit of the parish.

By s. 24 of the Burial Act, 1857, power to let and sell the unconsecrated parts of disused burial grounds was given to the trustees thereof, and the net moneys received by them were to be applied in discharge of incumbrances, and the residue for the benefit of the parish as the vestry should direct.

By s. 4 of the London Government Act, 1899, the powers and property of vestries were transferred to borough councils, but by s. 23 powers

relating to the affairs of the church and interests in church property were excepted:—

Held, that the houses in question came within s. 24 of the Act of 1857; that the word "parish" in that section meant not the ecclesiastical but the civil parish as defined by the Burial Act, 1852, and that this power of the vestry to direct the application of the rents was not a power relating to the affairs of the church within s. 23 of the Act of 1899, but had passed to the council under s. 4, although but for s. 24 of the Act of 1857 his Lordship would have held that the land must be treated as a whole and that the power did relate to the affairs of the church.

ACTION.

The parish of St. George, Hanover Square, was constituted under the joint operation of three Acts of Parliament, 9 Anne, c. 22, 10 Anne, c. 11, and 6 Geo. 1, c. xxxii., the object of which was to provide for the building of fifty new churches in and about the metropolis. The affairs of St. George's were governed under those Acts by a select vestry constituted by an order of commissioners appointed by the Acts. The rector and churchwardens were members of the vestry, which was a co-optative body until it was rendered elective by the Metropolis Management Act, 1855. The rector was ex officio chairman until the chairman became elective under the provisions of the Local Government Act, 1894, and after that date he remained chairman until the abolition of the vestry by the London Government Act, 1899, he being elected chairman by the vestry.

In the year 1757 it became necessary for the parish to acquire some additional ground for the purpose of burials, and they purchased five acres of land forming part of the estate of the Bishop of London, in the parish of Paddington, subject to a lease for lives vested in a family of the name of Frederick; 600*l.* was paid to the tenant for life, and certain annual payments to other parties interested were charged on the property, the 600*l.* being provided out of ecclesiastical funds. In 1762 the vestry obtained a private Act of Parliament, 3 Geo. 3, c. l., "for vesting certain parcels of land in Paddington, in the county of Middlesex, in the rector and churchwardens of the parish of St. George, Hanover Square, in the said county, and appropriating the same for a burial ground for the said parish." By that Act it was enacted that the land should be settled upon and vested in the rector and churchwardens of the parish of St.

WARRINGTON J.
1908
WEST MINSTER CORPORATION v. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS).

George for the time being and be deemed to be part of that parish, and be used, appropriated, and enjoyed by the inhabitants of the parish as a cemetery. The rector and churchwardens were to be liable for the annual payments. Nothing in the Act was to prejudice any of the rights or fees which the rector ought to have in the intended burial ground, but he and his successors and the churchwardens and other officers of the parish were to take the like funeral fees as had been taken for burials in the old cemetery. The vestry proceeded to build on part of the land a chapel, now known as the Oratory chapel, in the Bayswater Road, and enclosed with a wall so much of the land as they intended to use as a burial ground. The expenses of the Act of Parliament and of building the chapel and wall were provided for out of ecclesiastical funds. In 1765 the vestry obtained the consecration of the enclosed part of the land, including the site of the chapel.

In 1767 and 1768 the rector and churchwardens, acting under the direction of the vestry, granted building leases for ninety-nine years of the unconsecrated portion of the land at rents amounting together to 30*l.* a year, and several houses were built thereon. The annual payments charged on the land amounted to 17*l.*, so that only the net sum of 13*l.* a year was available. These ground rents were from the year 1768 to the year 1854 received by the churchwardens and accounted for by them in their accounts with other sums received by them as part of the revenues of the church, such as pew rents and offertories.

In the year 1854 the burial ground was closed by an Order in Council pursuant to the Burial Act, 1852, and a burial board was constituted for the parish, a new burial ground being obtained at Hanwell. From 1854 to 1865 the ground rent of 30*l.* was received by the burial board, apparently under the impression that it was their duty to keep the old burial ground and its chapel in order. In the year 1865 the original leases fell in, and the rector and churchwardens, acting under the direction of the vestry, granted renewed leases for twenty-one years at rents amounting altogether to over 2000*l.* a year. The consents required by the Burial Act, 1857, to such leases were not obtained. From that time the rents were collected by the

vestry clerk as rents due to the legal owners, the rector and churchwardens, and paid to a separate account, which was ultimately transferred to the general management account of the vestry; and from the year 1871 the rents were paid direct by the vestry clerk to that account and were applied by the vestry as part of the ordinary revenues of the parish.

The leases expired in 1886 and were renewed for short periods with the consents required by the Burial Act, 1857. In 1900 the houses were pulled down and fresh building leases were granted by the rector and churchwardens under the direction of the vestry, in some cases with the consent of the council of the city of Westminster and the consents required by the Act of 1857. The property was throughout the whole of this period managed by the vestry, and the rector and churchwardens took no part in the management of it except as legal owners and members of the vestry.

The council of the city of Westminster claimed that the power of the vestry of St. George's to administer the income of the property for the benefit of the parish had been transferred to them by the London Government Act, 1899, and they brought this action against the rector and churchwardens for a declaration to that effect, a declaration that they were entitled to call upon the defendants to convey the property to them, and an account.

Upjohn, K.C., *J. Brooke Little*, and *J. M. Gover*, for the plaintiffs. By s. 4, sub-s. 1, of the London Government Act, 1899, these houses and the power to administer their income have been transferred to us; the powers and duties, property, and liabilities of the vestry have been given to us, and we are entitled to exercise the powers and call for a conveyance of the houses. The rents and profits of the houses must be applied for the benefit of all the inhabitants of the parish of St. George as we shall direct, for the Act 3 Geo. 3, c. 1., says the property is to be held for the inhabitants generally. It is true that by s. 23, sub-s. 1, of the Act of 1899, "nothing in this Act shall transfer to a borough council any powers or duties of a vestry which relate to the affairs of the church

WARRINGTON J.

1908

WESTMINSTER CORPORATION v. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS).

or any interest of a vestry in any church property," but these houses are at most the subject of a charitable trust and do not come within that exception. They have never been church property, and the right to dispose of the rents and profits does not relate to the affairs of the church. We admit that "church" means the Church of England and that anything built on consecrated ground may be within the exception, but these houses are built on unconsecrated ground. Whether we are entitled to a conveyance or not, it is clearly our duty to administer the income and direct how the rents and profits are to be applied. This is a closed cemetery, and by s. 24 of the Burial Act, 1857, trustees of closed cemeteries are empowered to let, lease, or sell unconsecrated portions thereof which have not received interments, and, after payment of expenses and incumbrances out of the proceeds, "any residue of such monies shall, where such land or buildings shall have been held in trust for any parish, be applied in such manner, for the benefit of such parish, as the vestry of such parish shall direct." That is a power which is given to the vestry generally and is not confined to the benefit of members of the church. We are the successors of the old vestry, and by s. 4 of the Act of 1899 this power is transferred to us, and is not within the exception of s. 23, without regard to what might have been the result if this had not come within s. 24 of the Act of 1857. "Parish" means every parish having separate overseers of the poor: Burial Act, 1852, s. 52. That is in this case the old civil parish of St. George, not the ecclesiastical district of St. George. The defendants contend that this is an ecclesiastical charity for the benefit of the old ecclesiastical parish, but vestries have always acted in a dual capacity, civil and ecclesiastical, and there is nothing to shew that this was ever church property: *In re St. Botolph without Bishopsgate Parish Estates* (1); Phillimore's Ecclesiastical Law, 2nd ed. p. 1122. The fact that it is vested in the rector and churchwardens is immaterial. In the converse case a church does not become secular property because it is vested in a vestry: New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 10. We do not press for a conveyance.

(1) (1887) 35 Ch. D. 142, 150.

Danckwerts, K.C., *Cave*, K.C., and *Errington*, for the defendants. This property is vested by the Act of 3 Geo. 3 in the rector and churchwardens, so it cannot be maintained that it passed to the plaintiffs under the words "their property" in s. 4 of the Act of 1899. Therefore they have to fall back upon the words "powers and duties" and contend that this is a power within s. 24 of the Act of 1857 and has passed to them. Sect. 24 was never intended to alter trusts. This has always been church property, and the section makes no change. These houses are built on land which has never formed part of the cemetery, and the section does not apply to them at all. It applies only to burial grounds properly so called, and was passed to enable fruits to be obtained from land which would otherwise be unproductive. The use of a burial ground is only suspended by the Order in Council; it does not follow that it can never be used again. A church vestry is within the definition of a vestry in s. 52 of the Burial Act, 1852; in fact at that date there were only ecclesiastical vestries; therefore s. 24 refers to church vestries, not to civil vestries. No doubt the exact nature of the trusts on which this property is to be held ought to be settled by a scheme.

This is church property, and the power to direct the application of the rents is one which relates to the affairs of the church. Vestries had both ecclesiastical and civil duties to perform. The vestry of St. George was a church vestry, and this is an ecclesiastical power: 9 Anne, c. 22, ss. 3, 5; 10 Anne, c. 11, ss. 8, 10, 15, 19, 20, 21, 24, 26, 27, 31; 6 Geo. 1, c. xxxii.; 3 Geo. 3, c. l.; the Vestries Act, 1831, ss. 27, 40; *Berry* v. *Banner* (1); *Wilson* v. *McMath* (2); Canons Ecclesiastical, 85—89; *Reg.* v. *Select Vestry of St. Margaret, Leicester* (3); *Reg.* v. *D'Oyly* (4); *Mawley* v. *Barbet* (5); Metropolis Management Act, 1855, ss. 8, 91, Sched. A, part 1; *In re Hayle's Estate* (6); Metropolis Management Amendment Act, 1856, ss. 1, 3; Local Government Act, 1894, s. 31, sub-s. 2; London Government Act, 1899, ss. 4, 6, 23; *In re Garrard* (7); *Attorney-General* v. *Drapers' Co.* (8);

(1) (1793) Peake, 212.
(2) (1819) 3 Phillim. 67, 81.
(3) (1839) 10 Ad. & E. 730.
(4) (1840) 12 Ad. & E. 139
(5) (1799) 2 Esp. 687.
(6) (1862) 31 L. J. (Ch.) 612.
(7) [1907] 1 Ch. 382.
(8) (1858) 4 Drew. 299.

WARRINGTON J.
1908
WESTMINSTER CORPORATION v. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS).

Thornber v. *Wilson* (1); *In re Delany* (2); *In re St. Pancras Burial Ground* (3); *Ex parte Rector of Liverpool* (4); *Ex parte Rector of St. Martin's, Birmingham* (5); Burial Act, 1855, s. 18; *Reg.* v. *Burial Board of Bishop Wearmouth* (6); *In re Campden Charities* (7); *Mayor of Lyons* v. *Advocate-General of Bengal* (8); *Rex* v. *Coleridge* (9); *Hughes* v. *Lloyd* (10); *Westminster City Council* v. *Vicar and Churchwardens of St. Martin-in-the-Fields* (11); *Deptford Churchwardens* v. *Sketchley* (12); *Attorney-General* v. *Freeman* (13); *Attorney-General* v. *Eastlake.* (14)

Upjohn, K.C., in reply, referred to *Rex* v. *Martin Rice* (15); Webb's English Local Government, vol. i. p. 37.

WARRINGTON J. The question raised in this action is whether the rents of certain houses now known as Hyde Park Place, in the Bayswater Road, are to be applied under the direction of the plaintiffs, the Westminster City Council, as successors of the vestry of St. George, Hanover Square, for the benefit of the parish of St. George, or whether those houses are held upon some trusts of an ecclesiastical nature, the exact details and character of which would admittedly have to be settled by a scheme. The answer to this question depends upon the effect which ought properly to be given to ss. 4 and 23 of the London Government Act of 1899, having regard to s. 24 of the Burial Act of 1857, and I think the real question is whether or not the last-mentioned section applies to the land and buildings in question. [His Lordship stated the facts, and continued:—] We have had a good deal of discussion here as to the nature of the vestry in reference to ecclesiastical matters and as to whether in its origin the vestry was or was not an ecclesiastical body, and there is a good deal to be said in favour of the latter contention. There may be, and I think there is, a great deal to be said on

(1) (1858) 4 Drew. 350.
(2) [1902] 2 Ch. 642.
(3) (1866) L. R. 3 Eq. 173.
(4) (1870) L. R. 11 Eq. 15.
(5) (1870) L. R. 11 Eq. 23.
(6) (1879) 5 Q. B. D. 67.
(7) (1881) 18 Ch. D. 310.
(8) (1876) 1 App. Cas. 91.
(9) (1819) 2 B. & Al. 806.
(10) (1888) 22 Q. B. D. 157.
(11) (1906) 5 L. G. R. 500.
(12) (1847) 8 Q. B. 394.
(13) (1818) 5 Price, 425.
(14) (1853) 11 Hare, 205.
(15) (1697) 1 Ld. Raym. 138.

the opposite side, but for the purposes of this case I think all that discussion was, I will not say irrelevant, because one never knows on what a question may ultimately turn, but at all events a matter into which I need not enter now for this reason, that there is no question that in the case of this vestry, as in that of others of the same nature, the functions it exercised were twofold, first, in relation to the affairs of the church, and, secondly, in relation to secular affairs. The twofold nature of the functions of the vestry are recognized by the Act of 1899, as will appear when I read it presently.

The question which now arises is that which I stated at the commencement of my judgment, and the solution of it depends upon the proper interpretation and effect to be given to certain legislative enactments. In the first place I think it will be convenient to refer to the Act of 1899. That is a well-known Act intituled "An Act to make better provision for Local Government in London," under which certain metropolitan areas were constituted metropolitan boroughs. The particular area in question was afterwards made into a city by Royal charter. Sect. 4 of the Act is as follows: "On the appointed day every elective vestry and district board in the county of London shall cease to exist, and, subject to the provisions of this Act and of any scheme made thereunder, their powers and duties, including those under any local Act, shall, as from the appointed day, be transferred to the council for the borough comprising the area within which those powers are exercised, and their property and liabilities shall be transferred to that council, and that council shall be their successors, and the clerk of the council shall be called the town clerk, and shall be the town clerk within the meaning of the Acts relating to the registration of electors." The important part of the section is that to the council are transferred the powers of the vestry and the property of the vestry, and the council are to be the successors of the vestry. Then to that there is an exception arising out of the dual nature of the old vestries, or rather intended to meet questions arising from that dual nature. That is s. 23, which provides: "Nothing in this Act shall transfer to a borough council any powers or duties of a vestry which relate to the affairs of the church or any

WARRINGTON J.
1908
WESTMINSTER CORPORATION v. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS).

interest of a vestry in any church property, or shall make any incumbent or churchwarden an ex officio member of a borough council, and a scheme under this Act shall provide for vesting any such powers and duties in the inhabitants of some parish or ecclesiastical district, and for vesting any such interest in the incumbent and churchwardens or one or some of them." And then there is a provision, sub-s. 6 of that section: "Nothing in this Act shall affect the right to the benefit of any charity, or shall alter or confer any power of altering the defined charitable purposes (if any) to which any property is by law applicable at the passing of this Act."

A great deal of argument has been addressed to me on the question whether such power as the vestry had (I am not now referring to the Act of 1857), independently of special legislative enactments, with regard to this property was or was not a power relating to the affairs of the church. If it were necessary to decide that point, or if the decision of that point were to involve the decision of the question before me, I think I should have come to the conclusion that the power which they had and exercised in reference to this property was a power relating to the affairs of the church. The burial ground and land acquired, as is said in the Act 3 Geo. 3, c. l., for approaches, for drains, and so forth, to the burial ground must, in my judgment, be treated as one whole, and it must further be treated as being in reality an extension of the old churchyard or burial ground. It is vested in the rector and churchwardens, who I think for this purpose are ecclesiastical officers. The fees in respect of burials within it were to be paid to the rector. There are no provisions in any of the Acts regulating the powers of the vestry which give to the vestry any authority as in their secular capacity for dealing with burial grounds, and I think that so far (again I must guard myself by saying independently of statutory provisions) as the vestry dealt with this land they were dealing with it as part of their ecclesiastical functions, and that therefore it follows that such powers as they had exercised, if this Act stood by itself, would have to be regarded as powers relating to the affairs of the church, and therefore excepted by s. 23 from the general transfer of the powers of the vestry to the council.

But there is a legislative enactment which in my opinion alters the complexion of the case altogether, and that is the 24th section of the Act of 1857. That is a long section, and I will put it as shortly as I can. Omitting what is immaterial, it provides as follows: "In all cases in which unconsecrated land or buildings is or are vested in a trustee or trustees, either under any local Act or otherwise, for the purposes of a cemetery or burial ground, and burials in such cemetery or burial ground shall by Order in Council under the" Burial Acts "have been ordered to be wholly or partially discontinued, it shall be lawful for the trustee or trustees for the time being of such cemetery or burial ground, from time to time, with the sanction of one of Her Majesty's principal Secretaries of State, to let, demise, or lease any part or parts in which no interment shall have taken place of such land or buildings, and to renew or accept surrenders of any leases or tenancies thereof." Then there are provisions enabling the trustees with the like consent to sell, and then it proceeds: "and the net monies to be received by such trustee or trustees under any of the preceding powers shall be applied by them in discharge of any incumbrances affecting such cemetery or burial ground, and any debts which such trustee or trustees may have properly incurred in their fiduciary capacity; and any residue of such monies shall, where such land or buildings shall have been held in trust for any parish, be applied in such manner, for the benefit of such parish, as the vestry of such parish shall direct; but where such land or buildings shall have been held in trust for the benefit of private persons, such residue shall be divided by such trustee or trustees rateably among the cestuis que trusts; and it shall be lawful for such trustee or trustees so to apply any reserved fund in his or their hands." That is the section, and the real question in this case is whether that section applies to the land and buildings with which I have to deal.

In the first place, where the section uses the expression "where such land or buildings shall have been held in trust for any parish," that must mean land or buildings held for the purposes of a burial ground in trust for such parish, for this reason, that it is only land or buildings held in trust for the purposes of

WARRINGTON J.
1908
WESTMINSTER CORPORATION v. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS).

a burial ground to which this section applies, and, therefore, what is referred to as a trust for the parish is a trust of that limited and particular nature. I think the true meaning of the last few sentences of that section is merely this: that the framers of the Act were making one provision for the case of what one may call parochial burial grounds, and another provision for the case of what one may call private or proprietary burial grounds, of which, of course, there were several in the metropolitan area and in other parts of the country. Further, "parish" in that Act means the civil parish and not the ecclesiastical district; it means the parish or area having separate overseers of the poor as defined by the Act of 1852.

Now I come back to the question, does the land and do the buildings the subject of this action fall within that section? It will be remembered that the whole of the land acquired in 1763 was vested together in the rector and churchwardens to be used, appropriated, and enjoyed by the inhabitants of the parish as and for a cemetery or burial place, and for ways and passages to and from the same, and I think it is clear that not only that which was actually used for the burial ground and for ways and passages to it, but the whole of the land, including that on which the houses were erected and on which the present houses stand, was vested in the rector and churchwardens for the purposes of a burial ground, not necessarily to be actually used for interments, but for the purposes expressed in the Act. In other words, the uses or trusts declared by the expressions to which I have referred extend to the whole of the land vested in the rector and churchwardens and afterwards dealt with by them in the way I have mentioned. I have already found as a fact that the land on which the houses were built was unconsecrated ground. I am not forgetting that there is a small bit, a few feet, which appears to have been an encroachment by the side of the chapel on the land included in that which is consecrated. But "De minimis non curat lex," and I propose to treat the matter as if that little piece were not in question. The land, therefore, which is now in question, and the buildings upon it, was unconsecrated land. It was vested in trustees, namely, the rector and churchwardens; it was vested in them for the purposes of a

cemetery or burial ground. Burials in that cemetery or burial ground had by Order in Council been discontinued. The circumstances, therefore, which were necessary for the application of s. 24 are all to be found in the present case. Then, if that is so, the net rents arising from the present leases, which have all been granted in pursuance of the section and with the necessary consents, are to be applied for the benefit of the parish if the land and buildings were held in trust for the parish. In my opinion, according to the construction which I think is the true construction of this Act, the land and buildings were held in trust for the parish. The inevitable conclusion, therefore, is that the net rents of these houses were so applicable in such manner for the benefit of the parish of St. George as the vestry of that parish should direct, and the power which under that Act the vestry had of directing the application of the rents was not, in my opinion, a power relating to the affairs of the church; it was a power enabling the vestry to apply those rents for any purpose, ecclesiastical or otherwise, which they might think best in the interests of the parish. It seems to me, therefore, that the power which the vestry had under the Act of 1857 has now passed to and is exercisable by the council as their successors, and that they, as the plaintiffs in this action, are therefore entitled to succeed.

I think the proper form of declaration would be this: Declare that, pursuant to the 24th section of the Burials Act of 1857, the rents of the land and buildings in the pleadings mentioned, after discharging thereout any incumbrances affecting the burial ground and any debts which the rector and churchwardens may have properly incurred or may properly incur in their fiduciary capacity, are applicable and ought to be applied in such manner for the benefit of the civil parish of St. George, Hanover Square, as defined by the Act of 1857, as the plaintiffs, as the successors of such parish, shall direct.

July 31. The order was subsequently modified, and as finally settled provided that the money, after payment of incumbrances, should be applied in such manner for the benefit of the parish of St. George, Hanover Square, in the county of London,

WARRINGTON J.
1908
WESTMINSTER CORPORATION v. ST. GEORGE, HANOVER SQUARE (RECTOR AND CHURCHWARDENS).

as the same existed at the date of the passing of the Burial Act of 1857, and, subject to any modifications from time to time made by or under any statute as to such area, as the plaintiffs (being the successors of the old vestry of the said parish of St. George, Hanover Square) should direct, with liberty to apply as to the incumbrances.

Solicitors: *Allen & Son; Capron & Co.*

H. C. R.

EVE J.
1908
July 9, 10.

CHAPMAN *v.* MICHAELSON.

[1908 C. 508.]

Money-lender—Registration—Mortgage in unregistered Name—Invalidity—Declaratory Order — Jurisdiction — No Claim for ancillary Relief — Imposition of Terms — Waiver of Illegality — Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*a*), (*b*), (*c*)—*Rules of the Supreme Court*, 1883, *Order* XXV., *r.* 5.

In an action by the trustee of a debtor under a scheme of arrangement with his creditors against an unregistered money-lender, who had taken a mortgage from the debtor to secure a loan, the Court will make a mere declaratory order that the mortgage is illegal and void under s. 2 of the Money-lenders Act, 1900, although no ancillary relief is asked.

In such a case the Court will not impose upon the plaintiff equitable terms as to repayment of the actual money advanced as a condition of making the declaratory order.

Lodge v. *National Union Investment Co.*, [1907] 1 Ch. 300, distinguished.

Quære whether a statutory illegality can be waived.

THE plaintiff, George William Chapman, brought this action as the trustee of the property of Lewis Richard William Lloyd, under a scheme of arrangement with his creditors. This scheme was approved by an order of the High Court of Justice in bankruptcy on June 23, 1905. The defendant, Samuel Sydney Michaelson, was a money-lender, who carried on business as such, in partnership with Sydney J. Samuel, under the registered trade name of "Sydney Mostyn," at the registered address of 3, Lower Church Street, Bath, and 41, Bridge Street, Bristol, Gloucester. At the date of the mortgage next stated Lewis

Richard William Lloyd was entitled under the will and codicils of Baron Overstone, deceased, contingently on surviving Lady Lloyd Wantage and Lewis Vivian Lloyd, to a life interest in the estates of Baron Overstone, which were estimated to be of the value of 80,000*l.* a year. The defendant alleged that on February 14, 1905, he lent to L. R. W. Lloyd the sum of 2000*l.* on the security of a mortgage of that date upon his contingent life interest. This indenture of mortgage, dated February 14, 1905, was made between L. R. W. Lloyd and the defendant, therein described as Sydney Michaelson, of 3, Lower Church Street, Bath, in the county of Somerset, gentleman; and it was thereby agreed and declared (amongst other things) that in consideration of the mortgagee having discounted for the mortgagor, at his request, a promissory note for 4000*l.* dated February 14, 1905, the mortgagor covenanted with the mortgagee to pay him on April 14, 1905, the sum of 4000*l.*, with interest thereon at the rate of 20 per cent. per annum. For the consideration aforesaid the mortgagor conveyed and assigned to the mortgagee all that his contingent life interest under the will and codicils of Baron Overstone, subject to a proviso for redemption. In his statement of claim the plaintiff, in paragraph 6, alleged that "the said indenture of mortgage, and the said security purported to be created thereby, were entered into and taken by the defendant in the course of his said business as a money-lender, otherwise than in his said registered name of 'Sydney Mostyn,' and that the same and every part thereof were and was accordingly illegal and void and of no effect."

The plaintiff claimed a declaration that the alleged mortgage of February 14, 1905, was illegal and void under s. 2 of the Money-lenders Act, 1900.

It appeared that on April 5, 1905, a receiving order in bankruptcy had been made against L. R. W. Lloyd. Thereupon a scheme of arrangement was brought forward by L. R. W. Lloyd, under which he proposed that all his property which would become divisible amongst his creditors if he were adjudicated a bankrupt should vest in the plaintiff as trustee under the scheme, and be administered by him as if L. R. W. Lloyd had been adjudicated bankrupt at the date of the approval thereof by the

EVE J.
1908
CHAPMAN
v.
MICHAEL-
SON.

Court, and the trustee had been appointed his trustee in bankruptcy. By the scheme it was, inter alia, provided that the property (including the proceeds of sale of the share in the estate of Baron Overstone) should be applied, inter alia—(*c*) in satisfaction and discharge of all incumbrances created by the debtor, particulars of which were set forth in a schedule; (*d*) in payment of 20*s.* in the pound to all his unsecured creditors on the amount of their unsecured debts provable by them; (*e*) in payment to the debtor of any surplus remaining after payment in full of all creditors.

It was also provided by the scheme that on its being approved by the Court the receiving order should be rescinded. The defendant was included in the schedule to the scheme as an incumbrancer in respect of the principal sum of 4000*l.*

This scheme of arrangement was accepted by the creditors, and on being approved by the Court the receiving order was rescinded.

By his defence the defendant claimed that the exact amount due to him was 6347*l.* 7*s.* 11*d.* He did not admit the allegations contained in paragraph 6 of the statement of claim, and pleaded that the indenture of mortgage was not entered into by him in the course of his business as a money-lender, and that the advance to secure which the mortgage was given was outside of, and had no relation to, the business of money-lending as carried on by him in partnership with Sydney J. Samuel, and that the registered name "Sydney Mostyn" was not his registered name, but the registered name of the partnership. Further, that the plaintiff ought not to be allowed in equity to allege anything against the validity of the mortgage, because the plaintiff had become a trustee for the defendant under the scheme of arrangement of the property subject to the mortgage. Alternatively, that the plaintiff coming into Court and seeking equity ought only to be relieved upon the basis that he submitted to do equity, and that it was inequitable that the plaintiff should have any relief in the action otherwise than upon the footing that he should repay to the defendant the sum of 2000*l.*, with interest at the rate of 5*l.* per cent. per annum from the date of the mortgage, together with defendant's costs of his defence. The defendant counter-claimed

for a declaration that the plaintiff was an express trustee for him of the 4000*l.* and interest. In the course of the trial the defendant's counsel admitted that the loan was made by the defendant in the course of his business as a money-lender, and he offered to be satisfied with the 2000*l.* actually advanced, with interest at 5 per cent. This offer was not accepted by the plaintiff.

P. O. Lawrence, K.C., and *J. W. Galbraith*, for the plaintiff. The question is whether or not the defendant has committed a breach of any of the provisions of s. 2 of the Money-lenders Act, 1900. He has entered into the transaction in the course of his business as a money-lender, and as he entered into the agreement otherwise than in his registered name, he has committed a breach of s. 2, sub-s. 1 (*c*), and therefore the contract is illegal and void: *Victorian Daylesford Syndicate* v. *Dott* (1), followed and adopted in *Bonnard* v. *Dott* (2); *Lodge* v. *National Union Investment Co.* (3) The plaintiff merely asks for a declaratory order under Order xxv., r. 5, of the Rules of the Supreme Court, 1883, that the mortgage in question is void. No consequential relief is asked.

Jessel, K.C., and *J. B. Matthews*, for the defendant. The decision in *Lodge* v. *National Union Investment Co.* (3) concludes this case. No offer has been made to restore the money advanced under this mortgage, and if the plaintiff comes into a Court of Equity to obtain relief he must be put upon equitable terms. The Court will not make a declaration unless it is ancillary to the right of action. "To justify an action there must be a cause of action," as was stated in *Offin* v. *Rochford Rural Council.* (4) No doubt under Order xxv., r. 5, a declaration may be granted although no special relief is claimed, but that is only to secure future rights. Order xxv., r. 5, was intended to meet the limitation put upon the construction of the Chancery Procedure Act of 1852 (15 & 16 Vict. c. 86), s. 50, by the case of *Rooke* v. *Lord Kensington.* (5)

But where the plaintiff has a present right to relief he can

(1) [1905] 2 Ch. 624.
(2) [1906] 1 Ch. 740.
(3) [1907] 1 Ch. 300.
(4) [1906] 1 Ch. 342, 358.
(5) (1856) 2 K. & J. 753.

EVE J. 1908 CHAPMAN v. MICHAELSON.

only get a declaration as incident to it: *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*(1) Order xxv., r. 5, was discussed by Joyce J. in that case, and he said that there must be some limitation to the operation of the rule. The present case comes within the maxim that where a thing cannot be done directly it shall not be permitted to be done indirectly: *Chang-Yen-Mao* v. *Moreing* (2); *Fothergill* v. *Rowland.* (3)

A mere declaratory judgment, such as is asked here, can only, therefore, be granted (1.) where the question is one which affects a number of people, or (2.) where future rights are concerned. The Court will not make a declaration unless relief can follow from it: *Brooking* v. *Maudslay, Son & Field.* (4) As to the second point, the plaintiff is a trustee under the scheme, and the Court will require even a higher standard of conduct from its officer than from an ordinary litigant, and coming into equity he must do equity: *In re Hall.* (5) If there is any conflict between law and equity, then equity must prevail. Proper terms should therefore be imposed upon the plaintiff. Further, by the scheme of arrangement the debtor has waived the invalidity and has recognized the validity of this mortgage, and he and his trustee are so estopped from raising the question of the Money-lenders Act. The jurisdiction is in the Court of Bankruptcy directly the scheme of arrangement is approved, and there is no jurisdiction here to rescind the scheme. The proper course to take was to move to strike out the defendant's name from the list of creditors. It is also a question whether the Court will take judicial notice of the irregularity which would make this transaction void. The person interested may elect to waive the illegality, and the Court will not take the point for him. The debtor Lloyd having waived the illegality, the trustee cannot assert it. The principle applicable to cases of illegal transactions is discussed in *Flight* v. *Reed* (6), *Taylor* v. *Chester* (7), and *Simpson* v. *Bloss.* (8)

P. O. Lawrence, K.C., in reply. The only question is Aye or No,

(1) [1906] 1 Ch. 324; on appeal, [1906] 2 Ch. 498.
(2) (1906) 120 L. T. Jour. 313.
(3) (1873) L. R. 17 Eq. 132, 140.
(4) (1888) 38 Ch. D. 636, 641.
(5) [1907] 1 K. B. 875.
(6) (1863) 1 H. & C. 703, 716.
(7) (1869) L. R. 4 Q. B. 309.
(8) (1816) 7 Taunt. 246.

is this deed illegal? The trustee is bound to take a decision upon it. That the Court can make a declaratory order without giving ancillary relief is shewn by the case of *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1) The Court only imposes terms when equitable relief is sought.

EVE J. The action is brought by Mr. Chapman, who happens to be an official connected with the Bankruptcy Court, but, for the purposes of this action, he is simply the trustee of the property of one Lloyd under a scheme of arrangement sanctioned by the Court of Bankruptcy, under which the whole of the property of Lloyd was to be realized and applied in payment of certain costs, charges, and expenses, then in payment of creditors who are scheduled, and thirdly in payment of the unsecured creditors up to 20*s.* in the pound, and the surplus under the scheme of arrangement was to go to the assignor Lloyd. I am told, and it seems to be the fact, that the assignor is not likely to get much benefit out of the surplus, because, unfortunately for him, since that scheme of arrangement was arrived at further pecuniary difficulties have been encountered, and he is now, as I understand, an adjudicated bankrupt.

Amongst the debts which were enumerated in the schedule to the scheme of arrangement was a debt of 4000*l.* stated to have been due upon a mortgage executed in favour of the defendant to this action, Mr. Michaelson. The plaintiff no doubt, in the course of investigating the affairs of Lloyd with a view to carrying out his trust, investigated the circumstances under which that debt was incurred, and that mortgage executed, and, having investigated them, he came to the conclusion that there were facts connected with the execution of that mortgage which rendered the deed void under the provisions of the Money-lenders Act. The facts upon which he relied were these, that Michaelson was carrying on business as a money-lender in partnership with one Sydney J. Samuel, under the registered name of Sydney Mostyn, and that he was carrying on that business under that registered name at 3, Lower Church Street, Bath, at the time when he took the security of February 14, 1905, which was the

(1) (1904) 9 Com. Cas. 289.

EVE J.
1908
CHAPMAN
v.
MICHAEL-
SON.

security referred to in the schedule to the scheme of arrangement. That security was taken in his name of Sydney Michaelson, and not in the name of Sydney Mostyn. Mr. Chapman came to the conclusion that if those facts were established the deed would be void under sub-s. 1 (*c*) of s. 2 of the Money-lenders Act. There was this further alternative, that if it should be said, and successfully said, that inasmuch as Michaelson was carrying on business in partnership with Samuel as Sydney Mostyn he, individually, was not carrying on the business under a registered name, then his position would be this, that he had made this loan, being a money-lender, as an item in his money-lending business, and he had done it at a time when he was not registered as a money-lender. On either of those states of facts, if established, Mr. Chapman came to the conclusion that the document would be void, and accordingly, believing those to be the facts, he launched this action, stated the nature of the transaction, gave the dates proving his position, and made the allegation contained in paragraph 6 of the statement of claim. [His Lordship read the paragraph and stated the claim and the defences and counter-claim in the action.]

What the plaintiff took upon himself to establish was that the loan had been made by the defendant in the course of his business as a money-lender. It was obvious that it had not been made in the name of Sydney Mostyn, and he either had to prove that Sydney Mostyn was the registered name of the defendant, or, failing that, to prove that the defendant had not registered himself as a money-lender in order to comply with the statute. The action comes on for trial on those issues, and instead of the plaintiff being put to the proof of those issues by calling oral evidence, in the course of the case certain documents and returns are put in; and when the defendant's turn comes his counsel very frankly and very properly admits that he really is not in a position to contest these questions of fact, and that he must concede that this transaction was a transaction entered into by the defendant in his course of business as a money-lender; it was not entered into in the name of Sydney Mostyn, and the defendant was not registered under any other name, or in any other way. That being so, on the facts, the plaintiff is entitled

to his declaration; but then two, I may almost say three, points were raised by way of defence. In the first place, it is said that the Court, apart from the merits of this particular case, will not and ought not to entertain an action wherein the plaintiff is seeking merely a declaration of this description without going on to ask for what would, in ordinary course, be the ancillary relief; and that it is really an attempt to extract an opinion in a declaration from the Court, which the plaintiff is not entitled to do. In the next place, it is said that even if the Court should feel that the plaintiff is prima facie entitled to maintain the action, and entitled to a declaration, the Court ought to impose terms upon the plaintiff as the price at which he should be allowed to purchase this declaration. And then there is another defence which I will deal with separately.

Now, with regard to the first two defences, it seems to me that neither of them can prevail. I think that the plaintiff in this case—and it seems to me to be quite immaterial whether it was Mr. Chapman or Mr. Lloyd—was entitled to say, "I take upon myself to establish certain facts; the defendant denies those facts, and if, on the issue between us, the Court comes to the conclusion that I have established the facts, I ask for the statutory relief which necessarily flows from the establishment of those facts." He took upon himself to establish the fact that this transaction was a transaction entered into by the defendant as a money-lender. That is an issue which is an issue of fact, although under some circumstances, and in some respects, it may involve an issue of law; but in this case it really was reduced, I think, to an issue of fact. He has established that fact; and he took further upon himself the burden of shewing that the defendant had not registered himself as a money-lender, and I think he was entitled to come to the Court and say, "Declare that I have established those facts; declare that the defendant entered into this transaction as a money-lender; declare that he was not in fact registered, and consequently upon that declaration declare further that the document into which I have entered with him was illegal and void."

In my opinion the matter was one which the plaintiff, by some means or other, was bound, having regard to his position,

EVE J.
1908
CHAPMAN
v.
MICHAEL-
SON.

to get determined. He was the trustee for all the creditors of the assignor, and for the assignor, and until he had ascertained, in a way which relieved him from very grave responsibility, whether or not that transaction was illegal and void, he really was not in a position to ascertain for what persons he held so much of the estate as would, or might have to, be appropriated to answer this claim. I think that if authority were necessary it is to be found in the case which was last cited of *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1) But, even apart from that authority, I cannot help thinking that the Court would be loath, with a plaintiff situated like Mr. Chapman, to deny him a declaration which would enable him to discharge those duties which have been imposed upon him. On the next point I confess that I have felt some difficulty. The plaintiff, seeking this declaration for the purpose of enabling him, as he puts it quite frankly, to administer this estate, asks for a declaration purely and simply, and declines to entertain the offer which the defendant has made by his counsel to treat the liability of the estate to the defendant as measured by the actual moneys which were advanced, with 5 per cent. interest, and the costs which he has been put to in respect of the security and of this action. I have been much pressed with the decision of Parker J. in *Lodge* v. *National Union Investment Co.* (2) There the borrower sought a declaration that certain transactions were void and illegal under the Money-lenders Act. He further sought to recover and retake possession of property belonging to him, consisting of choses in action and policies of insurance which had been deposited with the money-lender as part of the transaction, and Parker J. held that, inasmuch as he had to come to a Court of Equity in order to get back those securities, it would not be just or right that his securities should be given back to him except upon the terms that there was extracted from him the money the benefit of which he had obtained as a part of the transaction which he was thereby getting declared to be illegal and void. But the basis of Parker J.'s decision is undoubtedly this, that the relief which the plaintiff was seeking could only be obtained in a Court of Equity. When I say that, I do not mean

1) 9 Com. Cas. 289. (2) [1907] 1 Ch. 300.

that it is relief which could not have been given in any other Division, but that it was in the nature of equitable relief, and that inasmuch as the plaintiff was coming for equitable relief, the Court, in the exercise of its equitable jurisdiction, would not give that equitable relief except upon the terms that the party to whom it was given should himself do equity. But in the present case I cannot regard the declaration which the plaintiff is seeking as in the nature of equitable relief. What really Lodge sought to do in the action which he was bringing was this: having established the illegality of the bargain, he was endeavouring to get equitable relief consequential upon that illegality. The only equitable relief which he was asking for there was the delivery up to him of securities which he had parted with under an illegal bargain. In this case no such claim is made. All that the plaintiff is asking me to do is to pronounce the judgment to which he is entitled upon the facts having been ascertained, and I think I should be carrying the principle which underlies Parker J.'s decision to a length which is not warranted by anything which he said if I were to hold that I must attach, as a condition to making this declaration on those facts, the repayment by the person obtaining that declaration of any sum of money. Of course, nothing which I say in this judgment is intended in the least to prejudice either party on the question as to what was the exact amount advanced, or what are their relative rights consequent upon the declaration which I am proposing to make. The other defence, which I have left to the last because it is not only raised by way of defence but is raised by way of counter-claim, is one upon which I have listened with the very greatest pleasure to a very learned argument by Mr. Matthews, an argument which certainly impressed me very much. But it comes to this: it is said that Lloyd, the borrower, being in a position to avail himself of the fact that this transaction was illegal by statute, elected, as he was entitled to do, not to raise that point, elected to treat the security as one binding him, and placed Chapman in possession of his property upon a trust which recognizes the validity of the security, and which really estops Lloyd or Chapman from now suggesting that the security is illegal and void. Without taking upon myself to determine

EVE J. 1908 CHAPMAN v. MICHAELSON.

whether it would be competent for Lloyd to waive the statutory illegality—I do not think it arises, in the view which I take of that defence and counter-claim—what I have really to consider is, Did the execution, or did the putting forward by Lloyd of this scheme of arrangement, and the adoption of it, or the ratification and approval of it by the Court, operate to estop Lloyd or Chapman from raising this question? It seems to me that at the root of that lies the question whether Lloyd was in a position, at the date when this scheme was put forward, and when these trusts were created, to appreciate what his true legal rights were. I must take it that if, at that moment, the defendant had been asked, Aye or No, is this security void? he would have asserted that it was not void. He would have asserted then, and maintained, that the transaction was outside the Money-lenders Act altogether; that it was a transaction which he was entitled to enter into as a private individual; that it was a transaction incapable of being impugned under the Money-lenders Act, because it was outside the scope of it altogether; and that any contention by Lloyd that it was illegal or void under that Act was wholly untenable. That being so, whatever Mr. Chapman's private views might have been, he would obviously have appreciated that there was, or that there would be in the future, some contest as regards the nature of the transaction. It was not a case in which, both parties being conscious and aware that they had entered into a bargain which was illegal and void, one of them, for purposes which suited his then arrangements, agreed to waive any right that he might have had to assert its invalidity and to adopt it as valid. He was face to face with a mortgagee who was asserting the validity of the transaction, and in that state of things it would be impossible for me to hold that Lloyd was in a position in which he must be held to have ratified an illegal bargain, seeing that at that moment, and right down to the trial of this action, the other party to the transaction was altogether disputing its illegality, and was indeed asserting its validity as a transaction outside the Act altogether. Under these circumstances I cannot myself hold that there was any waiver or any ratification by Lloyd brought about by means of the scheme, and consequently I cannot hold there is anything in the nature of an estoppel such

as would prevent Lloyd or Chapman from asserting, and I think successfully asserting, what they state are facts leading up and pointing to the inevitable invalidity of the transaction. Under these circumstances what I propose to do is to make a declaration that the alleged mortgage of February 14, 1905, is illegal and void under s. 2 of the Money-lenders Act, 1900.

Now I have to deal with the costs of the action and the costs of the counter-claim. With regard to the counter-claim, I think that has failed. It is a counter-claim under which, quite logically and quite properly, if I may say so, the defendant claims that the scheme constituted a trust in his favour for the principal sum of 4000*l.*, and under which he claims a very large sum, a sum of 6347*l.*, as being due to him under the security. So far as the counter-claim is concerned, I dismiss that with costs. With regard to the action, I feel really that, if I were to give the parties their strict rights, I ought to give the plaintiff the costs of the action, but I cannot help feeling—and this again I say with no idea to prejudice any future proceedings, but with a view merely to explain the considerations which have led me to adopt the course which I am about to adopt—that the defendant has met the case in Court with complete propriety and with some fairness. He has offered to take the actual sum which he says was advanced, namely, the 2000*l.*, with 5 per cent. interest, and the costs. I have not felt able to accede to any such proposal, but I think I shall not be doing injustice if, so far as the action is concerned, I leave both parties to pay their own costs. On giving judgment in the action, therefore, I do so without costs, but I dismiss the counter-claim with costs.

Solicitors: *Alfred Harris & Co.; Windybank, Samuell & Lawrence.*

G. M.

EVE J.

1908

July 16, 17.

COPE *v.* CROSSINGHAM.

[1907 C. 3331.]

Trade Union—Title to sue—Branch—Secession—Resolution for Distribution of Funds—Ultra vires—No Order for Payment—"Directly enforcing Agreement"—Jurisdiction—Trade Union Act, 1871 (34 & 35 *Vict.* c. 31), *s.* 4, *sub-s.* 3 (*a*).

A resolution was passed by the members of a branch of a registered trade union society that they would secede from the parent society and distribute the funds amongst the members of the branch. The trustees of the branch having declined to pay over the funds under their control to the head trustees, when required so to do, according to the rules of the society, the head trustees brought an action against the trustees of the branch asking for a declaration that the resolution was ultra vires, and also for an order for the payment to them of the funds of the branch:—

Held, following the decision in *Yorkshire Miners' Association* v. *Howden*, [1905] A. C. 256, that the society had a sufficient interest, under the rules, in the property of the branch to maintain the action, notwithstanding the provisions of s. 4 of the Trade Union Act, 1871, and that the proposed distribution was ultra vires and not in accordance with the rules of the society.

But *held*, that the Court would not make any order for payment to the head trustees, as that would be administering the funds of the society.

The plaintiffs Benjamin Cope, William Harris, and James Green were the head trustees of the Municipal Employees' Association, and the plaintiff George Hatchell was joined as a member of the Woolwich branch of the society. The defendants were the present trustees of the Woolwich branch and Arthur W. Hall, the secretary. The Municipal Employees' Association was a trade union constituted with branches and registered under the Trade Union Acts, 1871 and 1876, and was governed by rules registered on October 16, 1905.

By those rules the general management of the society was vested in a council called the national executive council, which was a body consisting of the general secretary and one member from each district, and the duties and powers of this council

were to see that all branch officers and others complied with the rules and saw that the funds of the society were devoted solely to the purposes set forth in the rules. By r. 15, which related to the formation and management of branches, it was provided (s. 8) that no branch could part with any of its funds for any purpose other than as specified by the rules, except by the sanction of the national executive council, and any branch secretary who paid away any money of his branch without such authority would be held responsible for the same. By r. 17, relating to branch secretaries and trustees, it was, inter alia, provided that the branch secretary should keep all books and accounts relating to his branch and carry out all instructions received from the general secretary, and be held responsible for all moneys of the branch; and no branch secretary was permitted to pay any money of the society other than as provided by the rules. The trustees were also not to withdraw any money without the request of the branch secretary or a written request from the general secretary.

There were also rules enabling the executive committee to make a levy in case of need; requiring a contribution to be made by the branches to the head office fund; and for the payment of surplus sick pay to the central society.

In 1901 a branch of the society, called the Woolwich branch, was duly constituted, and the plaintiff George Hatchell became a member thereof.

In 1907 the society had occasion to suspend from his duties one Albin Taylor, who was at that time the general secretary of the society.

On February 18, 1907, a meeting of the members of the Woolwich branch was held, when a resolution was passed as follows:—"That unless Mr. Albin Taylor is reinstated as general secretary of the Municipal Employees' Association, this branch decides to secede their membership from the Municipal Employees' Association on and after this date, and that the money be drawn from the Post Office Savings Banks and distributed among the members."

Mr. A. Taylor was not reinstated, and Richard Davies was appointed to be general secretary in his place. In May, 1907, Richard

EVE J.
1908
COPE
v.
CROSSING-
HAM.

Davies required the defendant Arthur W. Hall to pay over to him the funds of the Woolwich branch, in accordance with r. 17, but he refused to do so, and he and the trustees of the Woolwich branch withdrew the moneys of the branch from the Post Office Savings Bank, amounting to 32*l.* 7*s.* 6*d.*, made up of the trade fund and the sick fund, and, as alleged by the plaintiffs, threatened and intended to distribute the funds amongst themselves or to deal with them in a manner unauthorized by the rules. As a fact the trustees had, at the request and direction of their cestuis que trust, paid the funds over to a new society which had been lately formed, and of which it was alleged that George Hatchell had become a member. For the purposes of this action, however, the money was treated as being still under their control.

The plaintiffs alleged that the national executive council had not authorized the defendants to distribute the moneys of the Woolwich branch, and that the resolution purporting to authorize the distribution was wholly illegal and ultra vires. The plaintiffs accordingly claimed a declaration to that effect, and an injunction restraining the trustees of the Woolwich branch from dealing with the funds otherwise than in accordance with the rules of the society. They also asked for an order for the payment to them of the 32*l.* 7*s.* 6*d.*

The defendants pleaded that the Woolwich branch had ceased to exist, and that they held the funds merely as trustees for the persons who had been members of the branch and were not authorized to pay over the funds. They further pleaded that the plaintiffs could not maintain the action, as it was a claim not enforceable under the Trade Union Act of 1871 (34 & 35 Vict. c. 31), s. 4. That section provided that "nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, ... (3.) any agreement for the application of the funds of a trade union (*a*) to provide benefits to members."

A question of fact arose as to whether G. Hatchell was a continuing member of the Woolwich branch or had joined a new society.

H. S. Preston, for the plaintiffs. First, this action is maintainable and is not an action to enforce an agreement directly affecting the benefit of the members within the meaning of s. 4 of the Trade Union Act, 1871. Secondly, the plaintiff society, independently of the Trade Union Acts, is not an illegal society at common law, and can sue, apart from registration.

On the first question, the prohibition contained in s. 4 of the Act was applied in *Rigby* v. *Connol* (1) and *Chamberlain's Wharf, Ld.* v. *Smith* (2), but those cases are distinguishable from this because in them the object of the action was either for personal relief or to enforce a personal benefit; and in the former case the society, apart from the Act, was an illegal society. Here the plaintiffs ask that the branch funds be handed over to them as the head trustees of the society.

Duke v. *Littleboy* (3) is apparently against the plaintiffs' contention, but that decision has been practically overruled by the majority of the Lords in *Yorkshire Miners' Association* v. *Howden*. (4) In the last-named case the decision in *Wolfe* v. *Matthews* (5), which is very much like the present case, was approved, and both those cases support the first contention.

Swaine v. *Wilson* (6) was the case of a friendly society the objects of which were legal, and it shews that in the case of a society which is legal, independently of the Trade Union Acts, the fact that the society may have an illegal rule will not debar the society from obtaining relief.

In *M'Laren* v. *Miller* (7) the Court in Scotland held that there was nothing in s. 4 to prevent an interdict at the instance of the general trustees against the trustees of a branch applying funds for purposes other than those specified in the rules.

This is an action really for calling trustees to account, and there is nothing in the relief claimed inconsistent with the relief which the Court would ordinarily allow.

On the second contention, it is submitted that this is a legal society, and quite apart from the Act would be entitled to the

(1) (1880) 14 Ch. D. 482.
(2) [1900] 2 Ch. 605.
(3) (1880) 49 L. J. (Ch.) 802; 28 W. R. 977.
(4) [1905] A. C. 256.
(5) (1882) 21 Ch. D. 194.
(6) (1889) 24 Q. B. D. 252.
(7) (1880) 7 R. 867.

EVE J. 1908 COPE v. CROSSINGHAM.

protection of the Court. There is nothing in the rules which should put the plaintiffs out of Court. When these rules were made there were no provisions relating to seceding members, and the moneys of the society and branches were held under and subject to the rules, and there is no power in the branch trustees to apply the moneys in their hands to the branch or to any member of it.

Jessel, K.C., and *J. D. A. Johnson*, for the defendants. There are two main questions—first, whether the action is maintainable at all, and, secondly, assuming that it does lie, whether the funds of the branch are not the property of the branch.

The plaintiffs ask at the bar for the moneys of the branch to be handed over to them, but if the Court made any such order it would be administering the fund, and that was what the House of Lords refused to do in *Yorkshire Miners' Association* v. *Howden*. (1) The most that the Court can do is to restrain the misapplication of the funds by the trustees. The moneys in question were subscribed by the members of the seceding branch, and the defendant trustees ought not to be ordered to part with them.

[EVE J. The trustees must hold the funds according to the rules for the time being.]

But the Court is asked to compel the branch trustees to hand over this money, and that of itself makes this an action involving the application of the funds and not maintainable.

The Court will not, therefore, take upon itself to administer the funds of a trade union. With regard to the injunction which is asked, there is no case of this character where the Court has granted an injunction, except where it was satisfied that the persons to whom the funds were entrusted were about to devote them to illegal purposes. Here the trustees do not intend to do anything of the sort. In *Yorkshire Miners' Association* v. *Howden* (1) all that the House of Lords decided was that where there was any question of administration involved the Court had no seisin of the matter. In that case the money was going to be applied illegally for strike purposes. A second point arises here as to the ownership of the fund. The defendants

(1) [1905] A. C. 256.

are entitled to the legal custody of the funds of the branch, and in the absence of any intention to misappropriate them there is no jurisdiction to take them out of their hands: *Wolfe* v. *Matthews*. (1) There may be jurisdiction to prevent maladministration, but not to enforce proper administration. *Rigby* v. *Connol* (2) is distinguishable, and *Duke* v. *Littleboy* (3) is in our favour. It is said that these funds belong to the central society, but in order to ascertain that, they would have to be administered, and so it would fall within s. 4, sub-s. 3, of the Act.

H. S. Preston in reply, as to whether any order for payment should be made and as to the costs.

EVE J. This case raises one or two questions of interest and importance under the Trade Union Acts. Before I deal with the questions of law which have been fully argued before me, I will state the conclusion that I have arrived at on the only issue of fact about which there is really any serious dispute, and that is the question whether the plaintiff Hatchell appreciated, when he attended the meeting in March or April of 1907, the fact that he was then being treated as an enrolled member of a new society or organization. Now, having seen Hatchell in the box, having heard his evidence, and also that of Mr. Hall, who was called to contradict him, I have no hesitation whatever in expressing the opinion that Hatchell is right when he says that he did not appreciate, whatever Mr. Hall may have said to him, or may now think he said to him, that when he paid his subscription of 1*s*. 3*d*. on that occasion, and received by way of receipt therefor a red-coloured card, he had in fact been enrolled a member of and was paying a subscription to a new society. I do not think that it is material, from the point of view I take as to the law on this subject, that that issue of fact should be really found at all. But, as it is possible that this case may go further, it is only right that I should place on record the conclusion of fact that I have arrived at, having heard the two witnesses. I do not wish it to be concluded from that that I disbelieve Mr. Hall. My view is that Mr. Hall, no doubt, did explain to some of the members

(1) 21 Ch. D. 194. (2) 14 Ch. D. 482.
(3) 49 L. J. (Ch.) 802; 28 W. R. 977.

EVE J.
1908
COPE
v.
CROSSING-
HAM.

who were not present at the meeting what their position was in paying their subsequent subscriptions. But whatever he said, or whatever he now thinks he said to Hatchell, I am quite satisfied from Hatchell's evidence that he did not appreciate it, and that he honestly believed when he paid the subscription on March 4, 1907, that he was a continuing member of the Woolwich branch.

Now, having cleared the ground to that extent, the facts, which are practically admitted, but which it is necessary I should state for the purpose of explaining the conclusion at which I arrive, are these. This organization, the Municipal Employees' Association, was formed either in the year 1892 or 1894, and was duly registered as a trade union under the Act of 1871. In the course of its history it allowed the establishment of various branches in London and other parts of the country, and there was, no doubt, by the time the year 1907 was reached, a very large membership of this society, treating the members of the various branches as being members of the society. In the early part of the year 1907 some difference arose between the gentleman who was then acting as secretary of the society and the executive committee, the result of which was the suspension of the secretary from the discharge of his duties. The view which the secretary took was that he had been unjustly treated, and that the subsequent determination of his employment as secretary entitled him to compensation to the amount of 100*l.*, which was provided for in his agreement of service. The executive committee entertained a different view, and that dispute was referred to arbitration, with the result that the arbitrators decided in favour of Mr. Taylor, the secretary, and he was under the award held to be entitled to the compensation provided in his agreement. In the meantime, during the period of suspension, it has been stated, and not contradicted, that Mr. Taylor allied himself with some rival organization, and there is no doubt that a large number of the members of the union took the view that Mr. Taylor was being treated unjustly by the executive committee, and those members determined in so far as they could to support Mr. Taylor, and if Mr. Taylor withdrew or was dismissed from the society, and would undertake the organization and secretaryship of a new society, that they would themselves secede from the

old society and would follow into the new society so organized and managed by Mr. Taylor. Amongst other branches which sympathized with Mr. Taylor's position was the Woolwich branch of the society. That was a branch that had been established in the year 1901, and under the combined effect of the rules of this society and the Acts of 1871 and 1876 the property of the branches of this society, including the Woolwich branch, was vested in trustees, and in the month of February, 1907, the trustees of the Woolwich branch were the three first-named defendants, Crossingham, Last, and Condliffe. On February 18, 1907, a meeting of the members of the Woolwich branch was held, which I fully accept was properly convened by notice, and this resolution was submitted to the meeting, discussed, and duly passed: "That unless Mr. Albin Taylor is reinstated as general secretary of the Municipal Employees' Association, this branch decides to secede their membership from the Municipal Employees' Association on and after this date, and that the money be drawn from the Post Office Savings Banks and distributed among the members." At that time there was standing in the names of the trustees as trustees of this branch at the banks a sum of 32*l.* 7*s.* 6*d.*, and that sum was made up of the two funds which, according to the rules of this society, had to be kept separate, the trade fund and the sick fund. The trade fund amounted to 4*l.* 13*s.* 6*d.*, and the sick fund to 27*l.* 14*s.* Mr. Taylor, as I have indicated, was not reinstated as general secretary of the society, and he being succeeded in May of 1907 by Mr. Davies, this resolution became effective. As a matter of fact it had become effective long prior to that, because as early as the beginning of March it was known that Mr. Taylor was not to be reinstated. In that position of affairs the action is brought, and before I turn to the relief which is claimed I merely want to point this out in the defence, that the defendant trustees, very properly admitting in the pleading all those matters of fact about which there was no serious contest, said, in answer to the paragraph dealing with the resolution in the statement of claim which I have read, that "they were in possession of the said funds merely as trustees for the persons who had been members of the said branch on and prior to the

EVE J
1908
COPE
v.
CROSSING-
HAM.

18th day of February, 1907, and they were not authorized to pay over the said funds or any portion thereof to the said Richard Davies. Since the said month of May, 1907, and before the commencement of this action they have, at the request and by the direction of their cestuis que trust, paid out all moneys belonging to the trust which were in their possession, and they have not in their possession or under their control the said moneys or any part thereof." Now it seems that the resolution was not acted upon in terms. What was done was this: instead of distributing the money amongst the members, the money was paid over, as I understand, in one sum to the persons who constituted either the board of management or the trustees of the new organization which had come into existence. But, for the purposes of this trial, Mr. Jessel has admitted that the funds may be treated as being still in the hands of the three gentlemen who are the first defendants to the action.

That being the case, these gentlemen holding these funds, as they allege, as trustees for the members of the branch, and the members of the branch having indicated by their resolution and by their subsequent authorization that they intend that these funds should, if they legally can be, be paid over to the new organization of which they have become members, I have now to consider the relief which is sought in this action. The claim, as originally framed, asked for a declaration that the said resolution—that is, the resolution of February, 1907—"purporting to have been carried at the aforesaid meeting of the members of the Woolwich branch of the society was ultra vires and of no effect. That the defendants may be restrained by injunction from distributing the funds or property of the said Woolwich branch of the society amongst the members of the said branch, or from dealing with the same otherwise than in accordance with the rules of the society." The statement of claim then went on to ask that the three present trustees of the Woolwich branch might be removed, that three new trustees might be appointed in their place, and that the Court might order the trustees who were removed to hand over the funds in their hands to the new trustees so appointed, and then it went on to ask that, if and so far as might be necessary, the funds and

property of the Woolwich branch of the society might be administered by the Court, and finally it asked that all the defendants might be ordered to pay the costs. I do not pause to deal with the question as to whether any order could properly be made against the secretary, Mr. Hall, in respect of the relief claimed in the action, because, for reasons which I will deal with in a few moments, I am not going to make any order which will in any way affect him. The action as so framed comes on for trial, and at the hearing Mr. Preston, on behalf of the plaintiffs, who are the trustees of the parent society, asked that in lieu of an order removing the present trustees of the Woolwich branch and appointing new trustees of that branch, I should make an order directing the defendants, the present trustees of the Woolwich branch, to pay over the moneys in their hands to the head trustees of the society. For the purposes of this case I treat the prayer of the statement of claim as amended in that way, and I treat the action as an action asking for the relief which Mr. Preston has asked for. Now it is said that that action cannot be maintained. In the first place it is said that it is an action the bringing of which cannot be justified, having regard to the provisions of the Trade Union Act of 1871. I will deal with that objection first of all. Mr. Preston suggested that that objection might be met by this contention—that the society, the Municipal Employees' Association, was not an association which, apart from the Trade Union Act, would be an illegal association, and that, inasmuch as the terms of s. 4 of the Trade Union Act, 1871, were that nothing in the Act should enable any Court to entertain such an action, they certainly did not operate to prevent the Court from entertaining the action, if the society was in other respects a society which might have brought the action, apart from the Trade Union Act. I do not think that contention is well founded. It seems to me, reading the rules of this society, especially the rules which deal with the circumstances under which a strike is to be declared or not, that I could not possibly hold that, apart from the Trade Union Act, this would be an association which the Court could recognize as a lawful and legal association. I must, therefore, deal with this question which has been raised

EVE J
1908
COPE
v.
CROSSING-
HAM.

upon the footing that this is an association which, apart from the Act, could not have brought any such action as the one which I have now to consider. It is urged that this action is an action for the purpose of enforcing an agreement for the application of the funds of the trade union to provide benefits to members. I am reading the exact words of the Act because, as has been pointed out in some of the cases, they are not such as to remove difficulties in construction. Now the nature of the action is this. It is an action in which the trustees of the society are alleging that the trustees of the branch are about to apply the funds of the society contrary to the rules of the society. I feel constrained to say this—that, had the authorities stopped short of the decision of the House of Lords in *Yorkshire Miners' Association* v. *Howden* (1), I should have felt myself bound to hold, having regard more particularly to Denman J.'s decision in *Duke* v. *Littleboy* (2), that such an action was an action within the mischief of this section. But, having regard to the judgment of the House of Lords in *Yorkshire Miners' Association* v. *Howden* (1), and more particularly to some observations of Lord Davey which seem to me to point very strongly in favour of the plaintiffs in this case, I must hold that this is an action which can be maintained, notwithstanding the provisions of s. 4. The objects with which the Trade Union Act was passed are well known and are stated with perfect clearness by Sir George Jessel in *Rigby* v. *Connol* (3), and it occurs to me that it would be a shocking thing when legislation of this nature has been designed to protect members of these bodies from the fraudulent acts of their trustees and others in whom their property is vested, if the Court should be obliged to hold that, when the funds of the society, not necessarily in fraud of the members, but possibly under a mistaken construction of the particular rule, or under mistaken views as to what can be done at large, have been misapplied, the Court cannot intervene at the instance of those persons who have either contributed to those funds, or whose duty it was to protect those funds.

(1) [1905] A. C. 256. (2) 49 L. J. (Ch.) 802; 28 W. R. 977.
(3) 14 Ch. D. 482.

To deal with the argument addressed to me by Mr. Jessel's junior, it seems to me that the trustees of this society, although I understood from him they need not be members of the society, are persons who are interested, and very deeply interested, in the administration of the funds collected by the branches. As I pointed out in the course of Mr. Preston's reply, the rules shew that the head trustees of the society are very much concerned with the success and profitable carrying on of the branches. In the first place, in the event of a deficiency in the funds of the central society, there is a power vested in the executive committee to make a levy up to a very large percentage on all the funds of the branches. In the next place, it is the duty of the branch to contribute a sum of 6*s.* a year, or 1*s.* 6*d.* a quarter, to the head office fund in respect of each financial member of the branch. In the next place, there is a special fund, the Labour representation fund, of 1½*d.* per annum per member, which is payable without deduction to the head office; and finally there is the provision that any surplus of the sick pay over certain fixed amounts, which vary with the membership of the branch, shall be paid to the central society. This establishes, I think, that the trustees of the general funds of the society are interested to a very large extent in the property of the branches, and it appears to me that they have an absolute right—it may be that the individual member has it too, but for the purposes of this case it is not necessary for me to consider that—it is sufficient for me to say that the head trustees of the society have a sufficient interest in the property to enable them to maintain the action, and, when once that is established, it seems to me that I should be, to use Denman J.'s own language, frittering away the effect of the decisions (which in this case, of course, are binding upon me, and in his case he had not a decision which was really binding upon him) if I were to hold that this action is an action which cannot be maintained by virtue of s. 4, sub-ss. 2 and 3, of the Act of 1871. I hold, therefore, that the action can be maintained, and I hold this, further, that a distribution of the funds, either in strict accordance with the resolution of February 18, 1907, or a distribution which is a mere variation of the distribution there contemplated, is a distribution not in

EVE J.
1908
COPE
v.
CROSSING
HAM.

accordance with the rules of the society, and I must make a declaration to that effect.

Mr. Jessel suggests that, the trustees admitting that they have the funds in their hands, it is not a case in which an injunction ought to be granted, and I think, if, in the order, that admission is read, it is not a case in which, under the present circumstances, I should feel it necessary to follow the declaration with an injunction, but I shall give liberty to the plaintiffs to apply, a liberty of which, of course, they can avail themselves in the event of there being any threat to apply the funds otherwise than in accordance with the rules.

But that really only deals with a portion of the relief claimed. As amended, the claim now seeks for an order that the trustees of the branch do pay over to the head trustees the 32*l.* 7*s.* 6*d.* Now it is said that the funds really belong to the central association. On the other hand, Mr. Jessel and his junior say they belong to the branch. I do not think I am called upon to determine between those two contentions. It seems to me that the trustees of the branch hold these funds for the purpose of applying them in accordance with the rules of the society, and I cannot help feeling that if I were to follow up the declaration which I propose to make with an order directing payment, I should be adopting the course which the House of Lords and in all the other cases the Courts have declined to adopt, that is to say, I should be really administering inter se the funds of this society. As I understand, the object of the Legislature was this: so long as funds are safeguarded against being misapplied, the Legislature desires to leave in the hands of these bodies, composed as they are of men who may be taken to know their own business, the manner in which those funds should be dealt with, and having declared that the particular application which is proposed to be made in this case is an application which is not justified by the rules, assuming, as I do, that the effect of that declaration will be to prevent any misapplication, I am not prepared to go further and to say how and in what manner the funds which will then remain in the hands of these gentlemen as trustees are to be appropriated or dealt with. I may leave that to the trustees of the society to determine, either under the

existing rules, or by such alterations as may be legally introduced therein. I propose, therefore, to make the declaration and to give liberty to apply, and there I propose to stop, and having regard to the fact, first, that the plaintiffs here have claimed a larger relief than I am prepared to give them, having regard also to the fact that I have no doubt whatever that this is a perfectly honest and bona fide dispute, and that the parties have been fully justified in obtaining the opinion of the Court thereon, I should not think of visiting either of the parties with the costs of the other party. I make no order as to costs. There again I do not propose to direct any payment of costs out of the funds of the society, because I should be, as has been pointed out more than once, interfering with the administration in a way which might have the effect of vitiating that part of the judgment. I therefore make a declaration that the distribution of the funds or property of the Woolwich branch of the society in accordance with the resolution of February 18, 1907, would be ultra vires, and not in accordance with the rules of the society, and that the three defendant trustees hold the said funds and property upon trust to apply the same in accordance with the rules of the society. There will be liberty to apply generally, and no other order as to costs, or otherwise.

Solicitors: *F. A. S. Stern ; C. V. Whitgreave.*

G. M.

EVE J.
1908
Jan. 23.

In re DODSON.
YATES *v.* MORTON.

[1907 D. 1477.]

Partition Action—Order for Sale—Conversion—Death of Person entitled before Sale—Devolution of Share.

An order for sale properly made in a partition action operates as a conversion of the share of a person sui juris as from the date of the order, and, therefore, on the death before sale of the person entitled, his share of the unsold real estate will devolve as personalty.

Adjourned Summons.

By the judgment in an action, *Taylor* v. *Sykes* (1899 T. 1823), for partition of the real estate devised by the will of the above-named testator, who died on January 30, 1873, the usual inquiries were directed, and by the Master's certificate, dated June 12, 1901, and filed on June 18, 1901, it was found that, subject to certain trusts of the rents and profits for a period of thirty years from October 29, 1877, declared by the will, Edwin Yates, a defendant in the action and sui juris, was absolutely entitled to one-fifth share of the real estate.

By an order made on July 3, 1901, the real estate was directed to be sold.

Part only of the real estate had been sold when Edwin Yates died on May 14, 1903, intestate. Administration to his estate was granted to his widow, the plaintiff, Esther Yates, on December 5, 1903. He left two sons and one daughter, all infants, surviving him.

By an order dated January 23, 1904, made in the action, the defendants Broadbent and Brook were appointed trustees of the testator's will jointly with the continuing trustee, the defendant Morton, who was thereby ordered to convey the trust estate vested in him so as to vest the same in himself and the new trustees jointly to be held by them subject to the trusts of the will in accordance with the findings of the Master's

certificate, and it was thereby ordered that all further proceedings in the action should be stayed, except such as might be required to carry out that order.

The persons entitled to the remaining four-fifths of the real estate were desirous that it should be sold immediately upon the expiration of the period of thirty years.

This was a summons by the plaintiff against the trustees of the will and the infant children of Edwin Yates for the determination of the question whether his share of the real estate descended to his eldest son as heir-at-law, or whether it devolved upon the plaintiff and the three infant children as next of kin.

Napier, for the plaintiff, stated the case.

Clayton, for the infant defendant the heir-at-law. I submit that the share of Edwin Yates devolved in accordance with the character it possessed at the time of his death, and that accordingly the proceeds of sale devolved as personalty, and the unsold real estate was not affected by the order for sale, but devolved as realty upon the heir-at-law.

It is stated in Carson's Real Property Statutes, p. 734, on the authority of *Hyett* v. *Mekin* (1), that "an order for sale properly made in an administration action effects conversion as from its date and before sale," and that "in the case of sales under this Act"—the Partition Act, 1868—"there is a similar conversion as regards the share of a person sui juris"; and *Arnold* v. *Dixon* (2), *In re Pickard* (3), and *In re Morgan* (4) are referred to as authorities on the point, but I submit that they do not carry out the proposition in support of which they are cited.

In *Steed* v. *Preece* (5), where there had been an actual sale in an administration action, Jessel M.R. referred to *Oxenden* v. *Lord Compton* (6) and decided the case on the principle that the parties claiming must each take what they found at the death of the person entitled in the condition in which they found it. In *Arnold* v. *Dixon* (2), where the person entitled died before the sale was effected, Hall V.-C. professed to follow

(1) (1884) 25 Ch. D. 735.
(2) (1874) L. R. 19 Eq. 113.
(3) (1885) 53 L. T. 293.
(4) [1900] 2 Ch. 474.
(5) (1874) L. R. 18 Eq. 192.
(6) (1793) 2 Ves. Jun. 69.

EVE J.
1908
DODSON, *In re.* YATES *v.* MORTON.

Steed v. *Preece* (1), but in effect he did not do so, for the ratio decidendi of *Steed* v. *Preece* (1) was that the parties must take the property as they find it at the death of the person through whom they claim. In *In re Pickard* (2) also the sale had taken place before the death of the person entitled, and in view of the previous decisions the case could not have been decided otherwise; but I submit that the judgment is in favour of my contention. Similarly in *In re Morgan* (3) the sale had already taken place, and the fund was freed from all equity for reconversion. I submit, therefore, that those three cases do not support the proposition that an order for sale under the Partition Act of itself works a conversion.

Hyett v. *Mekin* (4) is not applicable, because that was the case of an administration action, and I submit that there is a difference in principle between sales made in a partition action and in an administration action. *Wallace* v. *Greenwood* (5) is distinguishable, because in that case there was a contract for sale which, if properly entered into, would of itself work a conversion.

Further, the effect of the order of January 23, 1904, was to rescind the previous order for sale, to vest the unsold real estate in the new trustees on the trusts of the testator's will, which contained no direction to convert, and to abolish all the proceedings in the action.

Beebee, for the infant defendants. I rely on the principle that equity regards that as done which ought to be done. The order for sale bound Edwin Yates and all persons claiming through him and operated to effect a conversion as from its date and before sale: *Hyett* v. *Mekin* (4), and per Jessel M.R. in *Wallace* v. *Greenwood*. (5) The date of Edwin Yates's death is the only material date and was anterior to the order of January 23, 1904, which therefore does not affect the question of devolution. The next of kin are therefore entitled to the whole share as personalty.

Bethell, for the defendant trustees.

(1) L. R. 18 Eq. 192.
(2) 53 L. T. 293.
(3) [1900] 2 Ch. 474.
(4) 25 Ch. D. 735.
(5) (1880) 16 Ch. D. 362.

EVE J. The question raised by this summons has reference to the devolution of the share of Edwin Yates in the real estate devised by the will of the testator, and which was the subject matter of a partition action in 1900. The judgment in that action was in the ordinary form, and on June 18, 1901, the Master filed his certificate, which in the result certified that the interest of Edwin Yates in the property was represented by one undivided fifth. Then the usual order for the sale of the entirety of the real estate was made, and on May 14, 1903, before that order was completely carried out, Edwin Yates died. As he died intestate, the question has arisen who are the persons entitled to his one-fifth share in the real estate remaining unsold and in the proceeds of sale of so much of it as was sold before his death. With regard to the proceeds of sale it has not been suggested that they would pass otherwise than as personal estate, but with regard to the unsold part Mr. Clayton has urged that, as no sale had taken place, it must be treated as retaining the character of real estate, notwithstanding the order for sale. His argument is contrary to the statement contained in Carson's Real Property Statutes, p. 734, referred to by counsel, but of course that statement cannot be accepted, except so far as it is supported by authority. Mr. Clayton has taken me through the authorities, beginning with *Steed* v. *Preece*. (1)

Now *Steed* v. *Preece* (1) seems to me to lay down a principle by which the Court might have been guided in ascertaining the rights as between real and personal representatives in a case where the person entitled died while the sale was still incomplete. That principle appears to me to be that the persons claiming must take the property as it actually existed at the death of the person entitled, and in *Steed* v. *Preece* (1), where the sale was already completed at the time of the death of the infant tenant in tail, it was held that the fund in Court which represented the proceeds of sale belonged to his legal personal representatives. If the matter stopped there, and I were to apply that principle to this case, it would seem that the property unconverted at the death of Edwin Yates should be treated as realty, and the converted property as personalty.

(1) L. R. 18 Eq. 192.

EVE J.
1908
DODSON, *In re.* YATES *v.* MORTON.

But since *Steed* v. *Preece* (1) was decided there have been a number of other decisions, and I find myself bound to hold that I am not at liberty to apply the principle in *Steed* v. *Preece* (1) as otherwise I would have done. That appears quite clearly from the words used by Sir George Jessel M.R. in *Wallace* v. *Greenwood* (2), for although it was not necessary in that case to ascertain whether the order had the effect of working a conversion, he nevertheless distinctly holds that the order does work a conversion. With reference to s. 6 of the Partition Act, 1876, he says (3), "Now, a sale under that section of the Act, in my opinion, operates as a conversion." With that Mr. Clayton agrees and says that it is consistent with the authorities; but then Sir George Jessel M.R. goes on to say: "Where the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty. There is no law that I am aware of which says that the Court is bound to preserve an infant's estate as realty during infancy: therefore, if the Court thinks it for the benefit of the infant to sell his estate, it has no hesitation in making an order for sale, and the estate then becomes converted into personalty."

That case was considered by Kay J. in *Hyett* v. *Mekin.* (4) He deals first of all with *Steed* v. *Preece* (1), and then, after referring to the later authorities, says (5): "It seems to me that the result of these authorities is clearly this: that if in an action for administration of an estate the Court in the exercise of its undoubted jurisdiction makes an order for the sale of the estate, the order for sale will amount in itself to a conversion. That was so decided by the late Vice-Chancellor Hall, in the case of *Arnold* v. *Dixon* (6)"; and then he refers to *Wallace* v. *Greenwood* (2) and to the words of Sir George Jessel M.R. which I have already quoted, and he says, "I respectfully say that I agree with that dictum of the late Master of the Rolls." So that I have the decision in *Arnold* v. *Dixon* (6), and I have also the judgment in *Wallace* v. *Greenwood* (2), in which Sir George

(1) L. R. 18 Eq. 192.
(2) 16 Ch. D. 362.
(3) Ibid. 365.
(4) 25 Ch. D. 735.
(5) Ibid. 742.
(6) L. R. 19 Eq. 113.

Jessel M.R. says that the order for sale works a conversion, and I have Kay J. agreeing with that dictum. In the face of that phalanx of authority it would be impertinent of me to go contrary to it, and I hold, therefore, that it is the order itself which effects a conversion.

Then Mr. Clayton urged that there was a difference between a partition action and an administration action, but I do not see how there can be any such distinction, and I think I should be departing from the line of authority if I held that there is a difference. *Wallace* v. *Greenwood* (1) was the case of a partition action, and no suggestion was made that there was any difference between the two.

One other point was taken on the order of January 23, 1904, namely, that it ought to be regarded as superseding the order for sale. But the difficulty in the way of that contention seems to me to be that the devolution on Edwin Yates's death had taken place before that order in 1904 was made, and what I have to determine is what were the rights of the parties in the state of things which existed at the time of the death of Edwin Yates in 1903.

I hold, therefore, that the beneficial interest of Edwin Yates in the one-fifth share of the property remaining unsold passed on his death to his legal personal representative as personal estate.

Solicitors : *Jaques & Co., for James J. Booth, Huddersfield.*

(1) 16 Ch. D. 362.

R. M.

C. A. 1908 Oct. 13, 14.

GREAT WESTERN RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY.

[1908 G. 275.]

Railway Company — Compulsory Powers — Powers excercisable for limited Period—Expiration of Time allowed—Company in lawful Possession of Land—Power to construct Railway thereon—Ultra vires.

In an Act of Parliament authorizing a company to construct a railway a section which provides that if the railway be not completed within five years from the passing of the Act, then, on the expiration of that period, the powers by the Act given to the company for making and completing the railway are to cease, only applies to powers which the company could not exercise except by virtue of the Act. If the company have, before the expiration of the five years, lawfully acquired the right to use the land, and if they are incorporated for the purpose of making the railway, they can make it under their common law powers notwithstanding the expiration of the five years.

Decision of Warrington J., ante, p. 455, affirmed on this point.

Decision on the main question of construction overruled.

Appeal from the decision of Warrington J. (1)

This action was brought for a declaration that the plaintiff company were entitled to exercise running powers over the Bristol and Gloucester line of the defendant company and over any part thereof, and for that purpose to run on and off the said line by means of junctions at Yate, Standish, and Berkeley Road, and that their running powers and rights through these junctions were not confined to traffic to and from the Berkeley Road Junction Railway, or traffic in connection with the Severn and Wye and Severn Bridge Railway, but extended to all the plaintiffs' traffic; and the statement of claim also asked that the junctions should be completed. The main question turned upon the true construction of an agreement made between the parties in 1896 and of the Great Western Railway (South Wales and Bristol Direct Railway) Act, 1896, whereby, inter alia, the Great Western Railway Company were to construct these junctions between their line and that of the defendant company, and

(1) Ante, p. 455.

the latter were to grant them an easement for that purpose. On February 4, 1898, the defendant company, in consideration of 300*l.*, granted to the plaintiff company a licence to enter upon their land and construct and use the junctions, subject nevertheless to the provisions of the Act of 1896. Sect. 21 of the Act was as follows: "If the railways be not completed within five years from the passing of this Act then on the expiration of that period the powers by this Act granted to the company for making and completing the railways or otherwise in relation thereto shall cease except as to so much thereof as is then completed." The plaintiff company constructed the junction railways, but had not actually connected them with the defendant company's line at the date of the writ in this action, and it was now suggested as a further defence that, as their powers had expired in 1901, they could not complete the junctions and were in the position of trespassers.

Warrington J. held that the defendant company were right on the main question, and that, upon the true construction of the Agreement Act of 1896, the running powers through the junctions were confined to traffic to and from the Berkeley Road Junction Railway and to traffic in connection with the Severn and Wye and Severn Bridge Railway, and, on the construction of s. 21 (the only point upon which any detailed report is given in the Court below), his Lordship held that only powers which the railway could not exercise except by virtue of the statute were to cease by virtue of that section, and if without having to resort to those powers the plaintiff company could by virtue of their right of ownership construct the junction lines, they were entitled to do so notwithstanding the expiration of the five years. The result of the whole case was that the declaration asked for by the plaintiff company was refused, and they were ordered to pay the costs of the action.

The plaintiff company appealed.

The defendant company also presented a cross-appeal against the decision upon the construction of s. 21.

Cripps, K.C., *Rowden, K.C.*, and *Howard Wright*, for the plaintiff company, argued the main question of construction.

C. A. 1908 — GREAT WESTERN RAILWAY v. MIDLAND RAILWAY.

Sargant (*Upjohn, K.C.*, with him), for the defendant company on the cross-appeal. If the defendants' contention on this point is held to be correct, it will be unnecessary to go into the main question of construction. It is admitted that at the date of the issue of the writ these junctions had not been connected with the defendant company's line. The ownership of the land on which the junctions were to be made was in the defendant company, and the only grant that was made to the plaintiff company was a grant of an easement of constructing and using a railway subject to the provisions of the Act of 1896. It was therefore the grant of an easement to do something subject to the conditions imposed by s. 21, to which some effect must be given; there is no question here of compulsory powers.

Tiverton and North Devon Ry. Co. v. *Loosemore* (1), upon which the decision under appeal was founded, is distinguishable. In the present case there is only a conditional grant of an easement; the purchaser of this easement did not comply with the conditions, and is therefore now disqualified by the very words of the Act of 1896, s. 21, from entering on the lands and exercising these powers. The plaintiff company here have not purchased out and out, as was the case in *Tiverton and North Devon Ry. Co.* v. *Loosemore* (1); all they have acquired is a right to construct junction railways subject to the provisions of this Act.

Counsel for the plaintiff company were not called upon on this point.

COZENS-HARDY M.R. We think the view of the learned judge on the construction of s. 21 was perfectly right. Within the statutory period the Great Western Railway Company did that which they were not only authorized but bound to do by s. 20, sub-s. 2, of the Act of 1896, which provides: "With respect to any land of the Midland Company which the company is by this Act authorized to use, enter upon, or interfere with, the company shall not purchase or take the same, but the company may purchase and take, and the Midland Company may and shall sell and grant accordingly, an easement or right of using the same for the purposes for which but for this enactment the company

(1) (1884) 9 App. Cas. 480.

might purchase and take the same." The meaning of that, when one looks at the plans, is quite clear. These little junction lines went a small part of the way over the property of ordinary landowners whose land was taken by the company and paid for in accordance with the provisions of the Lands Clauses Act, and involved bridges either over or under the Midland Railway. It does not matter whether they were over or under, and it was obviously right that for the purpose of these junction railways the Midland Company should not be required to convey the soil of the land; they were to retain that, but in lieu of that they were bound to sell and grant "an easement or right of using the same for the purposes for which but for this enactment the company might purchase and take the same." Within the period required by the Act the plaintiff company did purchase and pay for this easement or right to use the land which was required for the purpose, and it is now said that because the railway is not actually completed—the construction is not actually completed within the five years—although the Great Western Railway Company have acquired that which alone they were entitled to acquire under sub-s. 2—the whole matter is at large, and that the Midland Company are entitled to retain the consideration money in their pocket and to prevent the junctions from being made. I think such a contention is absolutely contrary to the decision of the House of Lords in *Tiverton and North Devon Ry. Co.* v. *Loosemore* (1), a case which, to my mind, presents much greater difficulties than this does. I do not desire to say anything more about this point except that I think Warrington J. was perfectly right in the decision he came to, and that this cross-appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion.

FARWELL L.J. I agree.

Upjohn, K.C., and *Sargant*, for the defendant company, then dealt with the main question of construction, and at the conclusion of their argument,

(1) 9 App. Cas. 480.

C. A. 1908 GREAT WESTERN RAILWAY v. MIDLAND RAILWAY.

The Court allowed the appeal, considering that the declaration made by the learned judge in the Court below on the main question was wrong and ought to be reversed, and a declaration made in accordance with the one asked for by the plaintiff company in their statement of claim.

Solicitors: *R. R. Nelson; Beale & Co.*

W. C. D.

C. A. 1908 *Oct.* 19.

BURGESS *v.* BOOTH.

[1873 B. 234.]

Conversion—Real Estate—Infant—Sale by Order of Court for Costs—Surplus Proceeds—Realty or Personalty.

Since the decision in *Steed* v. *Preece*, (1874) L. R. 18 Eq. 192, it is established that an order of the Court rightfully made for the sale of real estate operates as a conversion from the date of the order so that the proceeds of sale are personalty.

Decision of Eve J., [1908] 1 Ch. 880, reversed.

Scott v. *Scott*, (1882) 9 L. R. Ir. 367, disapproved.

APPEAL from a decision of Eve J. (1)

The question raised by this appeal was whether the surplus proceeds of sale of an infant's real estate, which had been directed by an order of the Court to be sold for payment of costs, descended to the infant's heir-at-law or went as personalty to his next of kin. The various orders made in the action and the facts are given in greater detail in the report of the case in the Court below, but the following summary is all that is necessary for the purposes of this report.

By an order made by Hall V.-C. on November 10, 1875, in the above-mentioned action it was ordered that, for the purpose of paying the taxed costs of various parties, such sums as the judge should direct should be raised by mortgage of the hereditaments the subject-matter of the action, to which the infant plaintiff had been declared to be entitled for an estate in fee, or that the said hereditaments and premises be sold, with the like

(1) [1908] 1 Ch. 880.

approbation, and that the moneys to be raised by such mortgage or sale should be paid into Court to the credit of the action, with liberty to apply.

Pursuant to this order, the whole of the infant plaintiff's real estate was sold in 1876, the proceeds were paid into Court, and the balance, after payment of the costs, was invested and was now represented by 1569*l.* 2*s.* 3*d.* Consols in Court.

The infant plaintiff attained twenty-one, and died intestate in September, 1905, leaving a widow and children surviving him.

On a petition for payment out of this 1569*l.* 2*s.* 3*d.* Consols, the question arose whether these proceeds of sale descended to the plaintiff's heir-at-law, or whether they went as personalty to his next of kin.

Eve J. held that the fund in Court passed to the heir-at-law.

The next of kin appealed.

Jenkins, K.C., and *Mansfield*, for the appellants. The absolute order for sale by the Court operates as a conversion from the date of the order: *Steed* v. *Preece* (1); *Hyett* v. *Mekin.* (2) The same point seems to be decided too by *Hartley* v. *Pendarves* (3) in the case of a sale of timber. *Scott* v. *Scott* (4), relied on by Eve J., is inconsistent with these authorities and cannot stand after *In re Grange.* (5)

[They were stopped.]

Austen-Cartmell, for the heir-at-law. *Scott* v. *Scott* (4), where all the cases are carefully reviewed, is an express decision that conversion only takes place pro tanto and for the purposes for which it is required. *Steed* v. *Preece* (1) is not a direct decision on this point, though there is a dictum of Jessel M.R. there which certainly is in favour of absolute conversion, but in *Steed* v. *Preece* (1) the order for sale was made as a substitute for partition; in *Hyett* v. *Mekin* (2) the Court was carrying out the trusts of a will which contained a power of sale, and in *Hartley* v. *Pendarves* (3) the Court, acting for all parties, was selling the property

(1) L. R. 18 Eq. 192.
(2) (1884) 25 Ch. D. 735.
(3) [1901] 2 Ch. 498.
(4) 9 L. R. Ir. 367.
(5) [1907] 2 Ch. 20.

C. A. 1908 BURGESS v. BOOTH.

of the lunatic tenant for life and of the remainderman. Here the sale of the infant's real estate was solely for the purpose of paying certain costs, and not for any other purpose. It was not necessary to sell the whole estate; the costs might have been paid by raising the amount on mortgage.

[FLETCHER MOULTON L.J. After *In re Grange* (1) in this Court it is impossible that *Scott* v. *Scott* (2) can stand.]

That case admittedly was not cited in the Court below, but it is distinguishable by the fact that the sale was made pursuant to the power of sale in the mortgage deed.

COZENS-HARDY M.R. Eve J., in deciding this case, has preferred the decision of the Irish Vice-Chancellor in *Scott* v. *Scott* (2) to a decision of Sir George Jessel in *Steed* v. *Preece*. (3) It may be, but I am not quite sure, that it was only a dictum of Sir George Jessel; but it was a dictum which, so far as I am aware, has never been qualified or disapproved of by any judge of the English bench, and it is a dictum which has been followed by decisions in Courts of first instance, and I think in this Court. As I read *Hyett* v. *Mekin* (4), Kay J. really did decide the point where Sir George Jessel had only expressed his opinion; and in the case which came before me when I was a judge of first instance, *Hartley* v. *Pendarves* (5), I undoubtedly gave a decision which covers this point. There timber on a certain estate had been sold under an order of the Court. I think both the tenant for life and the remainderman were lunatics, and the question was whether this was real estate of the tenant in tail in remainder or not. This being so, I said (6): "I think that where timber has been rightfully sold under an order of the Court all the consequences of conversion must follow, and that there is no equity as between the heir and the legal personal representative of the owner in fee"; and I referred to Sir George Jessel's view. Reading "land" for "timber," that is exactly the position in this case. But it is clear that this Court, in the case of *In re Grange* (1), arrived at a decision absolutely impossible to reconcile

(1) [1907] 2 Ch. 20.
(2) 9 L. R. Ir. 367.
(3) L. R. 18 Eq. 192.
(4) 25 Ch. D. 735.
(5) [1901] 2 Ch. 498.
(6) Ibid. 500.

with the Irish decision of *Scott* v. *Scott* (1), and I think conclusive of the present case. There a mortgagee sold the property under a power of sale in the mortgage, the mortgagor becoming lunatic after the mortgage but before the sale. He died intestate, and there, notwithstanding that the language of the mortgage deed said that the surplus of the proceeds was to be paid to the mortgagor, his heirs or assigns, this Court held without any hesitation, agreeing with Parker J., that (2) "There are no trusts for reconversion into real estate, and there is no equity between heir-at-law and next of kin, and there is no ground for holding that this is anything else than what it professes to be and is in fact, namely, cash." In my judgment every word in that judgment applies, and I think we ought now to lay it down, in a manner which admits of no doubt, that Sir George Jessel's decision in *Steed* v. *Preece* (3) goes the full length of those passages which I have cited.

FLETCHER MOULTON L.J. I am of the same opinion and have nothing to add.

FARWELL L.J. I agree. Sir George Jessel's dictum, if it was a dictum, is thirty-four years old. From that time, or, at any rate, since Kay J.'s decision twenty-four years ago, it has, according to my apprehension, been the understanding in the profession that conversion, unless there be statutory exception, is absolute. It is stated in Lewin on Trusts, 11th ed. p. 167, in a mode which commends itself to me, and which I think is accurate: "Since the decision in *Steed* v. *Preece* (3) it appears to be established"—and I would read "it is established"—"that an order of the Court rightfully made for the sale of an estate operates as a conversion from the date of the order, so that the proceeds of sale are personalty."

Solicitors: *Victor Thomasset; Sims & Syms, for Sims & Syms, Manchester.*

(1) 9 L. R. Ir. 367. (2) [1907] 2 Ch. 22.
(3) L. R. 18 Eq. 192.

W. C. D.

C. A.
1908
Oct. 16, 17, 28.

In re CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED.

PIGEON *v.* THE COMPANY.

[1900 C. 3686.]

Company—Debenture—Debenture-holders' Action—Supposed deficient Security—Principal and Interest—Payments on account—Appropriation of Payments—Orders directing Distribution of Dividend—Subsequent Surplus.

A debenture trust deed provided that the trustees should, in case of default by the company, apply the net proceeds of any realization of the securities, first in payment of interest, secondly of the principal, due on the debentures. The company made default, and a representative action was brought on behalf of the debenture-holders to enforce their security, in which the trusts of the deed were ordered to be carried into execution and the usual accounts were directed. The Master certified the amounts due to the various debenture-holders for principal, but, as the security was believed to be insufficient, he forbore to compute interest. The securities were gradually realized, and orders were made in chambers from time to time whereby dividends of 5*s.* in the pound, 10*s.* in the pound, and 5*s.* in the pound were directed to be paid "on the principal sums by the Master's certificate certified to be due to" the debenture-holders; the last of the dividends being further described as "the balance of the principal sum" so certified. A further sum was subsequently received sufficient to pay all arrears of interest and leave a small surplus for the company. The question now raised was whether by the terms of these orders the debenture-holders had lost their rights under the trust deed:—

Held (affirming the decision of Joyce J.), that there had been no final and complete appropriation by these orders as between principal and interest, and that the debenture-holders were entitled to receive the whole of their arrears of interest in accordance with the provisions of the trust deed, before any surplus was payable to the company. From the first the Court had professed to be carrying into effect the trusts of this deed and not to be varying those trusts.

In 1884 the defendant company was incorporated under the Companies Acts, 1862 to 1880, for the purpose of (among other things) acquiring, selling, and developing land in the province of Manitoba in Canada. The memorandum of association of the company gave power to borrow and raise money by debentures,

and for that purpose to charge all or any of the property of the company, including its uncalled capital for the time being.

In June, 1889, the company borrowed a sum of 10,000*l.* by the issue of a series of 100*l.* mortgage debentures for that amount, with interest at 8 per cent., which were secured by a trust deed dated May 31, 1889, in the usual form, by which the company conveyed and assigned all its present and future property to trustees, upon trust, in case of default by the company, to sell and realize the property and apply the net proceeds "in paying to the persons entitled to receive the moneys expressed to be secured by the said debentures in proportion to the amount due to them respectively without any preference or priority firstly the moneys for the time being due and owing to them for interest, and secondly the principal moneys for the time being due on the said debentures as aforesaid," and to hold the surplus, if any, in trust for the company.

The company having made default in payment of interest on these debentures, this action was commenced in November, 1900, by the plaintiff, "on behalf of himself and all other holders of mortgage debentures in the defendant company," against the company and the trustees of the deed of May 31, 1889, for the purpose of obtaining a declaration that the mortgage debentures constituted a first charge upon all the property and effects of the company comprised in the trust deed, for an account of what was due from the defendant company to the plaintiff and the other debenture-holders, and that the security effected by the trust deed might be realized and the trusts thereof carried into execution under the order of the Court.

On March 26, 1901, the action came on for hearing upon motion for judgment in default of defence, and an order was made in the usual form, declaring that the trusts of the deed of May 31, 1889, ought to be performed and carried into execution, that the plaintiff and the other debenture-holders were entitled to a charge upon the undertaking and property of the company, and directing the usual accounts and inquiries, with liberty to apply for a sale.

By his general certificate of February 17, 1903, made in pursuance of the said judgment, the Master found that there was

C. A. 1908 — CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED, *In re.* PIGEON *v.* THE COMPANY.

due to the plaintiff and the other persons named in the first schedule thereto, being all the holders of debentures issued by the defendant company and entitled to the benefit of the trust deed, and by virtue of such debentures, "the several sums for principal money set forth in the said first schedule and amounting altogether to 10,000*l.*" The certificate also went on to find that certain arrears of interest remained due from certain specified dates, but as the property comprised in and charged by the trust deed and debentures was "alleged to be insufficient for payment of such principal sums in full I have forborne to compute such interest."

Considerable sums were from time to time realized by the sale of the company's properties, which were partially distributed, under orders in chambers, as follows:—

On March 29, 1904, an order was made on further consideration by the Master, which directed the sale of sufficient new Consols in Court to raise, with the money on deposit and cash, the sum of 2584*l.* Of this amount, 84*l.* was by the payment schedule directed to be paid to the trustees of the deed for their remuneration, and the remaining 2500*l.* was disposed of by the following directions in column 1 of the payment schedule:—"Pay the following persons the following sums being a dividend of 5*s.* in the pound on the principal sums by the Master's certificate dated the 17th February, 1903, certified to be due to them, that is to say:—" The second and third columns contained the names of all the debenture-holders with the proportionate amounts at 5*s.* in the pound set opposite the respective names.

On January 12, 1905, another order in identical terms was made directing payment of "a further dividend of 10*s.* in the pound" to the debenture-holders.

By a third order of November 30, 1905, payment was directed in similar terms of "the following sums being 5*s.* in the pound the balance of the principal sums by the Master's certificate dated the 17th February, 1903, certified to be due to them," together with certain arrears of interest up to June, 1898.

By two subsequent orders of July 21, 1906, and July 18, 1907, further sums were distributed among the debenture-holders on account of arrears of interest.

Subsequently, in consequence of the recent boom in Canada, some of the company's land sold for much more than was anticipated, with the result that further sums of money were received sufficient to pay the whole of the principal and all interest due to the debenture-holders in accordance with the terms of the trust deed, and leave a small surplus to be paid to the company; the debenture-holders contended that notwithstanding the orders of March 29, 1904, January 12, 1905, and November 30, 1905, they were entitled to treat the payments made under these orders as payments on account, first of arrears of interest and secondly of principal.

The company contended that the effect of these orders was to apply the earlier payments first in reduction and ultimately in full satisfaction of principal, the result of which would be that the bulk of this unexpected surplus would not now be receivable by the debenture-holders for arrears of interest, but would go to the company.

Joyce J. held that there had been no final and complete appropriation of payments directed by the above-mentioned three orders as between principal and interest, that the matter must now be adjusted, and that the debenture-holders were entitled to receive the whole of their arrears of interest before anything went to the company.

The company appealed.

Younger, K.C., and *B. A. Hall*, for the appellants. The orders of March 29, 1904, January 12, 1905, and November 30, 1905, amount to a definite and final appropriation by the debenture-holders of the payments as between principal and interest, and the Court has now no jurisdiction to order a readjustment, but must deal with the matter on the footing of those orders.

[FARWELL L.J. Those orders all proceeded on a certificate which alleged deficiency.]

At the date of the last-mentioned order, November 30, 1905, the fund was shewn not to be deficient, yet the same principle was adopted. *Smith* v. *Law Guarantee and Trust Society* (1) is distinguishable, because in that case there was no appropriation,

(1) [1904] 1 Ch. 500; [1904] 2 Ch. 569.

C. A. 1908

CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED, *In re.* PIGEON *v.* THE COMPANY.

but the moneys were paid generally. Probably the orders were made in this form with a view to avoid any question with the revenue authorities as to income tax. This would be for the benefit of the debenture-holders.

Hughes, K.C., and *E. Ford*, for the respondents. The debenture-holders rely upon the express terms of the trust deed, which provides for payment first of interest, then of principal, and the judgment directing execution of the trusts of the deed. The company, so far as could be seen, had no interest in the matter. There is no evidence of any contract between the company and the debenture-holders altering the terms of the trust deed, and in the absence of such contract no variation can be made. The duty of the Court in carrying the trust deed into effect was to distribute the funds received in accordance with the rights of the parties as defined by the deed. There could be no appropriation until the terms of the orders were notified to the debenture-holders, and this was never done.

[*Younger, K.C.*, referred to *Simson* v. *Ingham*. (1)]

These are merely payments on account generally; and ordinary payments on account would usually be applied, in cases like this, first for interest due at the date of the dividend, and then in reduction of capital: *Bower* v. *Marris*. (2)

Each of the three orders was made on the basis of the Master's certificate, which contains a statement that the estate was believed to be insufficient, and it was only in 1907 that there was any prospect of a surplus. Had these orders purported to make any appropriation not in accordance with the terms of the trust deed they would have been bad, as not complying with the judgment. There has been no waiver by the plaintiff of the general rights of the debenture-holders: this being a representative action, it was not possible for the plaintiff to compromise without the leave of the Court or to give up any of the creditors' strict rights, and he had no power to do so. This being the case, the Court has now full power to adjust these payments and give the debenture-holders all that is due to them under the trust deed.

Younger, K.C., in reply. It is not contended that the plaintiff

(1) (1823) 2 B. & C. 65. (2) (1841) Cr. & Ph. 351.

is in a different position from the other debenture-holders, but if these orders, and particularly the third, are looked at, it is clear that there has been an appropriation of these three sums to principal, and the debenture-holders have elected to take the money on this footing.

There is nothing on the face of these orders to shew that they are interim or provisional orders; the mere fact that they refer to the Master's certificate does not make them so.

The company was not represented when these orders were made; they may therefore be taken to have been made in the absence of the company: they are clear and unambiguous, are binding upon the plaintiff and all the other debenture-holders, and cannot now be upset.

Cur. adv. vult.

October 28. COZENS-HARDY M.R. The question in this appeal is whether debenture-holders have lost the rights to which they are admittedly entitled under the trusts of the deed creating their security. This deed, which was executed in May, 1889, is in the usual form. It vests all the present and future property of the company in trustees, who in case of default by the company are to sell and realize the property and apply the net proceeds in paying, first, moneys for the time being due for interest, and, secondly, the principal moneys for the time being due on the debentures. The debentures were to secure 10,000*l.*, and they carried interest at 8 per cent. The company having made default, this action was commenced by the plaintiff, on behalf of himself and all other holders of mortgage debentures in the defendant company, against the company and the trustees. The company was duly served, but did not appear. By the judgment dated March 26, 1901, the Court declared that the trusts of the deed ought to be performed and carried into execution, and the usual accounts and inquiries were directed, with liberty to apply for a sale. By his certificate dated February 17, 1903, the Master certified the sums due to the several debenture-holders for principal money, amounting altogether to 10,000*l.*, but, as the property charged was alleged to be insufficient for payment of such principal sums, he forbore to compute interest.

C. A. 1908

CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED, *In re.* PIGEON *v.* THE COMPANY.

Cozens-Hardy M.R.

This is the course commonly adopted when an estate is believed to be insufficient.

From time to time considerable sums were realized and partial distributions effected under orders made in chambers by the Master, to which I must refer more particularly, and ultimately, by reason of a boom in Canada, there has been received sufficient to pay in full everything due to the debenture-holders according to the terms of the deed, and they claim payment accordingly. [Having stated shortly the three orders of March 29, 1904, January 12, 1905, and November 30, 1905, his Lordship continued:—] In these circumstances Joyce J. has held that the various payments were only on account and subject to final adjustment, and that the moneys now available for division ought to be distributed so as to give effect to the trusts of the deed, each earlier payment being applied first in discharge of interest and next in reduction of principal.

Counsel for the appellants—the company—contend that the effect of the orders was to apply the earlier payments first in reduction and ultimately in full satisfaction of principal, the result of which would be to diminish the amount now receivable by the debenture-holders and to increase the surplus for the company.

In my opinion this contention cannot prevail. I agree with Joyce J. that there has been no complete appropriation of the payments as between principal and interest. The Master's certificate, which is read in all the orders, was framed on the supposition that the security was insufficient even for the principal; but it gave the figures which enabled the moneys from time to time available to be rateably distributed, and the orders proceeded on that footing. I cannot treat them as finally appropriating the dividends in discharge of principal. The amount of the dividends paid was measured by reference to the principal sums stated in the Master's certificate, but that is all. It might have been better to have added in each order the words "generally on account" or their equivalent, but I think the practice of the Court justifies us in implying those words in a case like this.

The same conclusion may, however, be more easily reached by considering the nature of the action and the powers of the plaintiff

therein. This is a representative action in which a judicial decision on any question of construction or other matter arising in the action will bind all the members of the class represented by the plaintiff. Rules of Court provide for this. But if the plaintiff cannot compromise without the sanction of the Court (Order xvi., r. 9a), still less can he voluntarily give away any of the rights to which the persons whom he represents are admittedly entitled. He cannot elect on their behalf to take less than they are admittedly entitled to. Each individual member of the class has a separate right to elect, when the facts are known. If authority for this view is wanted it is clearly found in *Smith* v. *Law Guarantee and Trust Society.* (1)

Now in the present case there has been no adjudication by the Court that the dividends ought to be appropriated to capital, nor has there been any communication to the debenture-holders of the terms of the orders under which the dividends were paid, though I doubt whether such communication would have made any difference. From first to last the Court has professed to be carrying into effect the trusts of the deed and not to be varying those trusts. In truth, there was no jurisdiction to vary the trusts. Moreover, there was no consideration which could support a contract to take less than the debenture-holders were entitled to receive.

For these reasons I think the appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I have arrived at the same conclusion, but I base my judgment solely on the latter of the two points referred to in the judgment of the Master of the Rolls.

The plaintiff here was suing in a representative capacity on behalf of himself and all the other debenture-holders. The action was for the administration of the trusts of the trust deed, and judgment was given directing that they should be administered. The inquiry was solely for the purpose of that administration, and hence, by the very nature of the action and the judgment obtained in it, the duty of the parties conducting the inquiry was to administer the proceeds of the debenture

(1) [1904] 1 Ch. 500; [1904] 2 Ch. 569.

C. A.
1908
CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED, *In re.*
PIGEON *v.* THE COMPANY.
Fletcher Moulton L.J.

security in accordance with the trusts of the trust deed, and there was no power either in the Court or in the plaintiff to deviate from those trusts. The trust deed itself provided expressly for the appropriation of the funds realized and left no room for a volitional appropriation. If, therefore, the orders purported to make an appropriation of the sums realized which was not in accordance with the provisions of the trust deed, they were pro tanto destitute of force or validity.

Looking at the series of orders, I cannot come to any other conclusion than that they do purport to make such an appropriation. Even conceding that the first order might leave some doubt on the subject, the third order is so explicit that to my mind it leaves no doubt that it was intended both by the officer of the Court and by the plaintiff that such an appropriation should take place. If, therefore, the plaintiff had been suing in his own right and had thus been in a position to waive the strict observance of the provisions of the trust so far as they were in his own interest, I should have held that he was bound by the appropriation contained in the orders, but, seeing that he was suing in a representative capacity, no such appropriation could have any effect on the rights of those whom he represented. A nice question might have arisen as to whether he would be bound by it to the extent of his own interest in the fund, but we are relieved from deciding that point by the statement of the appellants' counsel that they do not desire to raise the contention that the plaintiff is in a different position in this respect from the other debenture-holders.

It is conceivable that in the case of such an invalid appropriation the individual debenture-holders might be bound by reason of having ratified it by receipt of payments thereunder with full knowledge of all the circumstances. But no such question can arise in the present case. The individual debenture-holders had no notice whatever that there had been any deviation from the strict provisions of the trust deed.

Counsel for the respondents also contended that the suggested appropriation could not be valid because it was against the interest of the debenture-holders to take payment on behalf of principal in priority to payment on behalf of interest, inasmuch

as they were entitled under the trust deed to interest upon unpaid principal, but not upon unpaid interest, and they likened such an appropriation to a contract made without consideration. In my opinion this argument is unsound. An appropriation, whether made by the payer or the payee, is equally valid whether it is judicious or not, and its validity is not in any way affected by shewing that it was unwise in the interest of the party making it. Counsel for the appellants, on the other hand, pointed out that the attempted appropriation would have certain advantages by reason of the fact that income tax would not have to be paid on moneys received in repayment of capital, whereas it would have to be paid on moneys received in payment of interest. For the reason I have just given I think that this fact is equally irrelevant.

On these grounds, therefore, I am of opinion that, in spite of the language of the orders, the Court must hold that the moneys paid under them were paid in the first instance in discharge of overdue interest, and only after all liability on interest account had been discharged must they be taken to have been paid on account of principal, and that, therefore, this appeal must be dismissed with costs.

FARWELL L.J. I agree with the judgment of the Master of the Rolls. When a Court of first instance has once finally adjudicated upon a question properly brought before it, whether on an interlocutory application or at the trial, and its order has been drawn up, passed, and entered, that Court has no power to vary or depart from such order: *Preston Banking Co.* v. *Allsup & Sons.* (1) But in actions for the execution of trusts, the administration of estates, taking mortgage accounts, and the like, numerous orders are made which are not and are not intended to be final, but are steps taken in working out the judgment and leading up to the final settlement of the whole matter in question in the action. Some of such orders are interim orders—for example, the appointment of a receiver—and others are subject to adjustment on final distribution or settlement, for I agree with Byrne J. in *Smith* v. *Law Guarantee and Trust Society* (2), where he says that "the

(1) [1895] 1 Ch. 141. (2) [1904] 1 Ch. 507.

C. A. 1908 — CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED, *In re.* PIGEON *v.* THE COMPANY. — Farwell L.J.

Court will, so long as trust property remains to be distributed, take care that any adjustment shall be so made as to make good any payments which ought properly to have been made had circumstances allowed them to have been made from time to time as and when they ought to have been." And see *Livesey* v. *Livesey*. (1)

In the present case the trusts of the debenture-holders' deed are clear; there is no question to determine, no doubtful right to compromise; the trust is to pay the interest first and then the principal. The judgment of the Court declared that this trust ought to be carried into execution by the Court. No other declaration could have been made except by the consent of all the debenture-holders, and such consent could not be given by a representative plaintiff suing on behalf of himself and others. Such a plaintiff is entitled to enforce the rights which all enjoy in common for the common benefit of all, but not to give up or alter any such rights, at any rate without the leave of the Court under Order xvi., r. 9a. When the Master made his certificate it was believed by all parties that the value of the debenture-holders' security was hopelessly inadequate to pay even the principal in full, the company did not think it worth while to appear, and the plaintiff and the trustees united in asking the Master not to take the account of interest, as it would be a mere useless expense, and the only account taken accordingly was that of capital. This is in accordance with everyday practice in the Chancery Division and well illustrates my earlier observations (I am dealing with a case in which all parties are not consenting). The judgment directed the account of both principal and interest. In working out the judgment it is open to the judge to direct that one account shall be taken before another, so that, if when final distribution is reached the deferred account shall be found to be unnecessary, the expense of taking that account may be avoided. But such postponement is not and cannot be an alteration of the judgment, if circumstances ultimately shew that the deferred account ought to be taken. It was not competent to the judge by any interim order to discharge the direction to take the income account, which was the first

(1) (1827) 3 Russ. 287.

trust of the deed, without the consent of all parties, although on final distribution he can, of course, direct that an idle account shall not be proceeded with. In the present case each order for payment was made as a step towards final distribution, and each payment is therefore subject to adjustment, so long as any sufficient funds remain under the control of the Court. There was not, and could not properly be, any adjudication by the Court in each order that the sum paid was to be taken in extinction of so much capital; nor did any order purport to be such an adjudication. No order was ever expressed to be made "notwithstanding the judgment," as was the case in *Staniar* v. *Evans* (1), the decision in which case, however, can hardly be relied on after *Preston Banking Co.* v. *Allsup & Sons.* (2) It was, in fact, a payment on account of and by reference to the only sum of which the Master had taken an account. It was not a final payment destroying the creditors' right, but a payment on account without prejudice to that inherent right of adjustment which always exists in cases of this nature.

It may well be, as Romer L.J. suggests in *Smith* v. *Law Guarantee and Trust Society* (3), that if the judge had in fact made the orders in such a way as finally to determine rights, such orders would be binding, although wrong, until reversed by this Court; but when, as here, the orders all read the certificate and proceed on the assumption of insufficiency of estate, and are nothing more than payments on account, although not so called, this Court ought to read them as orders on account which could properly be made in accordance with the usual practice, and not as final orders contradicting the judgment, which could not properly be made at all.

Some point was made as to income tax, and it was suggested that the orders took the form that they did in order to avoid any question with the revenue authorities. Whether this was so or not is, in my opinion, immaterial. The Crown is entitled to income tax on income, not on capital, and the Courts have never allowed the possible claim of the Crown to interfere with the administration of estates in the manner most beneficial to the

(1) (1886) 34 Ch. D. 470. (2) [1895] 1 Ch. 141.
(3) [1904] 2 Ch. 576.

C. A. 1908 — CALGARY AND MEDICINE HAT LAND COMPANY, LIMITED, *In re.* PIGEON *v.* THE COMPANY. — Farwell L.J.

parties. It is clear that the Crown could not have obtained an order that these sums ought to be treated as income on the footing that the revenue would suffer if they were not. The rights of the parties are determined in an action to which the Crown is no party. If the Crown has any claim, it can enforce it by proper proceedings; but the Courts have never admitted as a legitimate argument that on one view duty will be payable and on another it will not, and therefore that the former ought to prevail. The rights of the parties are determined without regard to any such considerations; indeed, in the case already cited, *Smith* v. *Law Guarantee and Trust Society* (1), this Court assumed that the parties would elect in such a way as to avoid income tax. But the Crown in fact gains by the adjustment of accounts which ought in my opinion to be made, because the whole account will be recast ab initio, and income tax will accordingly be payable throughout.

In my opinion the judgment of Joyce J. was right, and this appeal should be dismissed with costs.

Solicitors: *H. A. Graham & Wigley; Woolley & Whitfield.*

(1) [1904] 2 Ch. 569.

W. C. D.

ELLISTON *v.* REACHER.

C. A. 1908 Oct. 14.

[1907 E. 388.]

Vendor and Purchaser—Restrictive Covenants—Building Scheme—Rights of Purchasers inter se—Covenant to observe Covenants in General Deed—General Deed not executed — Reservation to Vendor of Right to dispense with Restrictions.

A building society purchased the F. estate in 1860. A sale plan was then prepared, on which the estate was plotted out into lots, and the conditions which were to affect the different lots were printed. Among these were conditions that each purchaser should execute a deed of covenant for regulating building on his lot and securing performance of the conditions therein contained, and that no hotel should be built on any lot and no building used as such without the vendors' consent. At the end was a proviso that the vendors should have power to deal with any part of the estate not disposed of without reference to the restrictions. In January, 1861, the estate was conveyed to trustees for the building society.

A deed was then prepared, purporting to be made between the purchasers whose names were set out in the second schedule of the first part and the trustees of the second part. It contained covenants by the purchasers with each other and the trustees to observe the restrictions contained in the first schedule. These restrictions were the same as those on the sale plan. This document was engrossed, dated January 16, 1861, and stamped, but it was never executed either by the trustees or any purchaser. A printed form of conveyance was prepared for the society which contained a covenant by the purchaser to observe and perform the restrictions and covenants contained in an indenture dated January 16, 1861, and expressed to be made between the persons whose names were subscribed in the second schedule of the first part and the vendors of the second part. The defendants were owners of two lots conveyed to their predecessors in title by deeds in the printed form on December 27, 1861, and April 19, 1866, on which they had recently erected a building which they were using as an hotel. The plaintiffs were the owners of three plots conveyed to their predecessor in title on December 27, 1861, and brought this action to restrain the defendants from carrying on the hotel. The several conveyances under which the plaintiffs and defendants claimed were executed by the vendors only, not by the purchasers:—

Held (affirming the decision of Parker J.), that, notwithstanding the reservation of a dispensing power to the vendors and the non-execution of the deed of covenant, there was a general building scheme for the

C. A.
1908
ELLISTON
v.
REACHER.

benefit of the purchasers inter se as well as of the vendors, and that the covenants could be enforced at the suit of the plaintiffs.

Parker J.'s statement of the requisites for enforcing restrictive covenants as between different purchasers approved.

Osborne v. *Bradley*, [1903] 2 Ch. 446, distinguished.

APPEAL from a decision of Parker J. (1)

This action was brought to restrain the defendants from using a building in Brownlow Road, Felixstowe, as an hotel contrary to certain restrictive covenants.

The plaintiffs and the defendants other than the defendant Quilter were owners of different plots of land forming part of an estate known as the Felixstowe estate. Quilter was the lessee of the hotel in question, which had been built on two plots of land belonging to the defendants. The Felixstowe estate had been bought by a building society in 1860, and in that year the land was plotted out for sale in numbered lots which were shewn on a sale plan exhibited in the office of the society. On this plan the conditions subject to which it was intended to sell the lots were printed. Condition 3 was that each purchaser should execute a deed of covenant for regulating the building upon and fencing of his land and securing the performance of the conditions therein contained. In January, 1861, the estate was conveyed to two trustees for the society. Shortly after this date a draft deed was prepared, engrossed, dated January 16, 1861, and stamped. It was expressed to be made between the several persons whose names were inscribed in the second schedule thereto of the first part and the trustees of the building society of the second part, and recited that the parties of the first part had purchased from the trustees the several lots therein mentioned, and that on the occasion of the several purchases it was agreed that the several parties of the first part should enter into the covenants thereinafter contained. It was then witnessed that each of the parties of the first part covenanted with the others of them and as a separate covenant with the trustees (inter alia) to observe, perform, and fulfil all and every the covenants, restrictions, and agreements as to the mode of building on and the occupation of the lots respectively purchased by them contained in the first

(1) Ante, p. 374.

schedule thereto. The first schedule contained terms and conditions corresponding with those in the sale plan, including the following restriction: "On no lot shall any hotel, tavern, public-house or beer-house be built, or any house be used as such, or any manufacture carried on, without the consent of the vendors." The vendors reserved a power of sanctioning an hotel, tavern, public-house, beer-house, or manufactory upon any lot, and also a power as to any portion of the estate not disposed of, to deal with the same without reference to and independently of the restrictions.

To this document a map or plan of the Felixstowe estate was annexed, shewing part plotted out for sale in lots numbered as on the sale plan, and the rest marked as reserved. This document was never executed either by the trustees or any purchaser, but the Court held upon the evidence that it was the document referred to as an indenture of January 16, 1861, in the conveyances hereinafter mentioned.

The society had a printed form of conveyance which was used for the conveyances of the plaintiffs' and defendants' lots to their predecessors in title and in many other sales. One of the defendants' lots and the three lots owned by the plaintiffs were conveyed by the trustees by separate deeds to H. C. Cobbold on December 17, 1861; the other of the defendants' lots was conveyed by the trustees to John Bawtree on April 19, 1866. Each of these conveyances described the lot conveyed as part of a larger estate called the Felixstowe estate, delineated on a plan drawn in the margin of the deed (which was taken from the sale plan) and numbered with the same number as in the sale plan. Each deed also contained a recital of a contract to purchase subject to the covenant thereinafter contained, and a covenant by the purchaser that he and all persons claiming under him should at all times observe, perform, and fulfil the covenants, restrictions, and agreements as to the mode of building on and the occupation of the premises and otherwise contained or referred to in an indenture dated January 16, 1861, and expressed to be made between the several persons whose names and seals were subscribed and set in the second schedule thereto of the first part and the vendors of the second part. These

C. A. 1908

ELLISTON v. REACHER.

conveyances were executed by the vendors only and not by the purchasers.

The hotel complained of was originally designed and in part erected as a boarding-house, but was completed and used as a private hotel. The plaintiffs had not opposed the erection of the building, but had announced their opposition as soon as a licence was applied for. It was admitted that the consents required before a building could be used as an hotel had not been obtained.

Parker J. held that the existence of a building scheme intended for the benefit of all the lots sold was proved, that the covenants not to use the land as an hotel were binding on the defendants' lands and could be enforced by the plaintiff Elliston, and granted an injunction at his suit. As regarded the other plaintiffs he held that certain dealings with their lands by a conveyance in 1880, subsequent to the conveyances from the building society, prevented them from enforcing the covenants, and dismissed the action so far as they were concerned.

The defendants appealed. There was no cross-appeal by the plaintiffs other than Elliston, and the Court of Appeal expressed no opinion on this part of the case.

Levett, K.C., and *Whinney*, for the appellants. There was no general scheme for the benefit of the lots sold in this case. The question whether there is such a scheme must always be decided by the facts of the case. Here it is negatived by the reservation to the vendors of the power to vary or dispense with the covenants and by the non-execution of the deed. The conditions printed in the sale plan required every purchaser to execute the deed, but it never was executed by any purchaser or by the trustees. The true inference from that is that the trustees had waived the conditions. This inference is strengthened by the fact that the purchasers did not even execute the conveyances to themselves.

[FARWELL L.J. It was held in *Formby* v. *Barker* (1) that the non-execution of a deed by the company did not prevent their taking the land subject to the condition contained in a covenan therein.]

(1) [1903] 2 Ch. 539, 549.

The non-execution was strong evidence of the intention of the parties. H. C. Cobbold, the predecessor in title of both plaintiffs and defendants, was, as appears later in the title, a relation of and a trustee for J. C. Cobbold, one of the trustees of the society. But J. C. Cobbold did not execute the document of January 16, 1861, nor did H. C. Cobbold execute the conveyances to him. It is impossible to believe that J. C. Cobbold intended to be bound by the scheme. It was within the knowledge of all parties that there were no covenants in existence such as the purchasers, by the printed conveyances, covenanted to perform, and therefore the covenant in the conveyances was void, though they did not trouble to strike it out. The non-execution of the conveyances makes the inference that no scheme was intended to be binding still stronger.

[COZENS-HARDY M.R. It is laid down in Co. Litt. 230b that a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it.]

Still stronger evidence that there was no general scheme is afforded by the dispensing power reserved to the vendors. There was no auction, only a succession of private sales. The first purchaser had no security that any plot except his own would be bound, and subsequent purchasers would have to inquire whether any prior purchaser had been excused from the covenant, and would have no certainty as to any plots sold after his own. The case is exactly covered by *Osborne* v. *Bradley*. (1) The Court has to find, in the words of Farwell J., "that all the purchasers intended to contract with one another, as they purchased, to abide by the various stipulations or covenants which are made applicable to the whole estate; and also . . . . that the vendor intended to enter into similar covenants." Farwell J. held himself precluded from coming to the latter conclusion by the fact that the vendor had reserved a dispensing power, as he has in this case, and from coming to the first conclusion because it was impossible for the purchasers to ascertain to what property the covenants would apply. It is equally impossible here.

Buckmaster, *K.C.*, and *Tomlin*, for the respondents, were not called upon.

(1) [1903] 2 Ch. 446, 453.

C. A. 1908 — ELLISTON v. REACHER.

COZENS-HARDY M.R. This is an appeal from the judgment of Parker J., who has dismissed the action so far as two out of three plaintiffs are concerned, and has granted an injunction, at the suit of the plaintiff Dr. Elliston, restraining the defendant from using part of the Felixstowe estate as an hotel. As there is no appeal from that part of the judgment which dismissed the case so far as the other two plaintiffs were concerned, it is not necessary for me to say more than that I desire not to be taken as either differing from or assenting to that view. If a similar point ever comes up again, I should desire to have an entirely open mind upon it. But as to the case as between Dr. Elliston and the defendant Reacher, I so entirely agree with the careful and, I think, accurate judgment of Parker J. that I do not think I should be justified in occupying more than a few minutes in endeavouring to put, in words not so good as his, the conclusion at which I have arrived in confirmation of his view.

The plaintiff's case is shortly this. The plaintiff says there was a building scheme affecting this estate, which was divided up into lots. The defendants and the plaintiff, Dr. Elliston, claim under common vendors, and it was part of the scheme that there should be covenants for the mutual benefit of all parties, including the restriction on building an hotel without the consent of the vendors, and the benefit of those covenants should be not merely as between the vendors and the several purchasers, but as between the several purchasers inter se. He therefore says that he is now entitled to relief against the defendants, who are admittedly using this property as an hotel without the consent of the vendors. The peculiarity of the case, so far as it differs from an ordinary case, is this. In the first place, I never saw a case in which there was so clear a manifestation of an original intention to have a building scheme. I hold in my hand a plan prepared by the Conservative Land Society, which bought the estate of, I think, forty acres; it is more or less laid out in roads and plots, and on the side of the plan there are terms and conditions of sale, one of which is No. 3. [His Lordship read the condition.] Then occurs a number of provisions about roads, and so on, including No. 5: "On no lot offered for sale

shall any hotel," reading it shortly, "be built or any house be used as such without the consent of the vendors, their heirs and assigns." Lest it should be supposed that I have forgotten it, I will say there is also added at the end a provision that the vendors reserve a right to deal with any part of the estate not disposed of without reference to these conditions. The property was copyhold, and after having been enfranchised it was conveyed to trustees for the building society, who ultimately conveyed certain lots to the plaintiff's predecessor and the defendant's predecessor, and a document was prepared which bears date a week after the conveyance to the trustees. This document is dated January 16, 1861, and it contains a plan identical with that which I have referred to; it is engrossed, it is stamped, and it contains all the material covenants and conditions which are found on the plan, and on the face of that document it is expressed that each purchaser undertakes, not merely with the vendors, but with the other purchasers, that the obligations of this condition shall be fulfilled. That engrossment is not executed by any one. It remained in the safe of the society, and nothing more was done with it in the shape of execution, but printed copies of that document were prepared and were shewn to the purchasers, who also had copies of this plan, with the conditions on it, and so far as the evidence goes the inference to my mind is irresistible that there has not been a single purchaser of any of the lots of this first portion, of which alone we have heard, who has not completed his purchase on the faith and on the footing that he was bound and that the other parties were bound by the stipulations of this engrossment. But we have had a very learned and interesting argument from Mr. Levett that all that is pure waste, and that although the conveyances, all of which so far as we know are in common form, all contain an express reference to this document, which they call a deed of covenant as to the occupation of the plots of land on the Felixstowe estate, the document is a mere waste bit of parchment containing a stamp for the benefit of the Government, and is not a deed, because it is not executed by any one. I entirely decline to accept that view, and I desire to accept to the full what Parker J. has stated. If this document referred to in the

C. A. 1908 — ELLISTON v. REACHER. — Cozens-Hardy M.R.

conveyance can be identified, the mere fact that it was wrongly described as an indenture is, in my judgment, immaterial, and on this question of identity the nature and contents of the document are of the utmost importance. I therefore hold, without any doubt or difficulty, that these various lots were subject, as part of the building scheme, to the terms and conditions found annexed to the plan, and which are found in the engrossment. Having arrived at that conclusion, it is difficult to see what is left. It was said that you must infer from the fact that that engrossment was never turned into a deed, was never executed, that the whole building scheme was abandoned. That is an inference of fact, and I must say I never saw a case in which it was to my mind more manifest than it is in this that the deliberate continued intention of all parties from 1860 onwards was that this building scheme should continue in force and be operative on all parties. Then it is said that the whole scheme is inconsistent and cannot have been intended, because there was power in the vendor to deal with property undisposed of without reference to this deed. That is an argument which has not been brought forward for the first time here. So far as I am aware it is an argument that has never prevailed. I do not deny that the insertion of such a power is an element to be considered, but out of many building schemes which I have seen I think I am right in this remark, that it is altogether exceptional not to see some power reserved to the vendor to abstract certain property from the scheme. On the face of the scheme, which all the parties were content with, they were told that they entered into this building scheme with the knowledge that the vendors might, if they were so advised, on the one hand give consent to the erection of a public-house next door to the man who bought a lot, and on the other hand release any unsold property from the covenants. I cannot see that that has any real importance in the case.

Then it was argued, somewhat boldly, that the whole scheme was at an end, if I follow the argument rightly, because of the four lots which were purchased by Mr. H. C. Cobbold; so far as appears, he was the only purchaser of the property; the other deeds were not produced, and it was unreasonable to suppose

that there was any contract entered into between Mr. Cobbold as purchaser of lot 26 and Mr. Cobbold as purchaser of lot 27. I cannot assent to that. I do not think that is the true way to look at it. The very essence of every scheme of this kind is that it does not depend on the fact of there being separate purchasers of each lot, but it means that each lot, into whosesoever hands it comes, whether into the hands of the man who has bought half a dozen lots, or originally to a man who has bought one lot from the vendor, shall be subject in either case to the burden and have the benefit of the restrictive covenant. I do not think in the few words I have uttered I have added anything to the judgment of Parker J. I only desire to say I entirely adopt and agree with it, and I think this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion and cannot add anything whatever.

FARWELL L.J. I am of the same opinion. I only wish to add something with reference to *Osborne* v. *Bradley*. (1) It appears to me to have no bearing on this case, and I do not desire to withdraw anything I said in that case. The question is one of fact: Was there, in fact, a building scheme, or was there not? In *Osborne* v. *Bradley* (1) I held that there was no building scheme at all, but merely a deed between A. and B. containing covenants for the benefit of A, and therefore the fact that he dealt with the land did not operate as a release. This is quite a different case. It appears to be clear that the case would be unarguable if the deed of covenant of 1861 had been executed, and seeing that its non-execution makes no difference to the question of liability, the conveyance in 1861 to the defendants' predecessor in title is not merely made subject to the covenant referred to in the deed, but contains an actual covenant by the purchaser to observe and fulfil all those covenants. It might very well be that if the property was conveyed merely subject to the covenants in a deed and no such deed had ever been executed the property would not be bound, because there are no covenants

(1) [1903] 2 Ch. 446.

C. A. 1908 ELLISTON v. REACHER. Farwell L.J.

which bind any one, but where a man covenants that he will abide by the covenants described as being set out in the deed, then it becomes a mere question of reference, and the document called a deed may be identified as the document intended although it is not a deed. Therefore there is no difficulty in the present case in finding, as the Master of the Rolls has said, that there was a perfectly clear original intention to have a scheme. There is no doubt that the defendants' predecessor in title, and all the subsequent purchasers who have since bought, bought subject to the scheme and covenanted that they would abide by these covenants in the deed. With reference to the power of the vendor to vary the conditions, I pointed out in *Osborne* v. *Bradley* (1) that it was one element to consider and assist the Court in arriving at the conclusion of fact whether there was or was not a scheme, and nothing more than that. I never intended to suggest that it was fatal to the existence of a scheme.

Solicitors: *Turner & Co.; Sharpe, Pritchard & Co., for Cobbold, Sons & Co., Ipswich.*

(1) [1903] 2 Ch. 446.

J. R. B.

In re LORD GRIMTHORPE.
BECKETT *v.* LORD GRIMTHORPE.

[1907 G. 1457.]

Settlement—Real Estate—Trust for Conversion—Failure of Objects of Trust—Realty or Personalty—Estate Duty.

By a marriage settlement of 1845, real estates were conveyed by a settlor to trustees, subject to the prior life interests of his parents therein, to the use of the settlor for life, and, after his death, to the use of trustees upon trust to sell and hold the proceeds for certain specified purposes for the benefit of the settlor's wife and children, with an ultimate trust for the settlor, his executors, administrators and assigns. The settlor died in 1905, without having had any issue, and all the purposes for which conversion had been directed had at this date failed. By his will the settlor had devised "his interest" in these estates to his "successor Lord G. in fee":—

Held (differing with the decision of Eve J., [1908] 1 Ch. 666, on this point), that, as the trust for sale arose only after the death of the settlor, there was at that time in the events which had happened no enforceable trust, and the question of conversion or reconversion did not arise; but (affirming the decision of Eve J. in the result, and agreeing with him on this point) that these estates devolved as realty under the testator's will, and the estate duty payable in respect of them was properly payable by Lord G.

Attorney-General v. *Hubbuck*, (1884) 13 Q. B. D. 275, and *Clarke* v. *Franklin*, (1858) 4 K. & J. 257, distinguished.

Appeal from a decision of Eve J. (1)

The question raised by this appeal was whether on the proper construction of a settlement of 1845, and in the events which had happened, real estates in Lincolnshire, in which the late Lord Grimthorpe was interested, devolved on his death as realty or personalty for the purposes of the incidence of estate duty.

The facts and the documents are set out in greater detail in the report of the case in the Court below, but the following statement is sufficient for the purposes of this report.

By his marriage settlement of September 30, 1845, the late Lord Grimthorpe, the settlor, disentailed his Lincolnshire estates and conveyed the same to trustees upon trust during the lifetime

(1) [1908] 1 Ch. 666.

C. A. 1908

GRIMTHORPE (LORD), *In re.* BECKETT *v.* GRIMTHORPE (LORD).

of his parents and the survivor of them to receive certain annual payments therein mentioned, and after the death of the survivor of his parents, to the use of the settlor for life, and after his death to the use of the trustees upon trust for sale and investment as therein mentioned, and then to pay an annuity of 250*l.* to his wife, if living, for her jointure, or, if she should be dead, to such other person as the settlor should appoint, and, in the next place, to stand possessed of a sum of 10,000*l.* upon trust for such person or persons as the settlor should by will direct and appoint, and to hold the residue upon trust for the settlor's children or their issue as he or his wife should appoint, and in default of appointment equally between such children at twenty-one or marriage, and in default of such children or a child attaining a vested interest in trust for the settlor, his executors, administrators and assigns. The survivor of the settlor's parents died in May, 1874. In February, 1901, the settlor made a will whereby (inter alia) he appointed and devised "my interest in the estates in Lincolnshire under my marriage settlement dated 30th day of September 1845 to my successor as Lord Grimthorpe in fee." By a tenth codicil in December, 1902, the settlor left his books and papers to his successor, "to whom I also appoint my Lincolnshire estates." In December, 1901, the settlor's wife died. There was no issue of this marriage.

In April, 1905, the settlor died without ever having had any issue, and without ever having exercised the powers of appointing the said life annuity of 250*l.* or the sum of 10,000*l.* or any part of it, and consequently all the objects for which conversion had been directed by the settlement failed. The present Lord Grimthorpe contended that the estates devolved as personalty, and that the duty payable on the settlor's death was payable out of the residuary personal estate.

Eve J. held that these real estates were impressed with the character of personalty from the day of the execution of the settlement, and remained personalty down to the settlor's death, but that the testamentary dispositions of the testator had effected a reconversion, and, consequently, that the estate duty was payable by the defendant, the present Lord Grimthorpe.

The defendant appealed from the latter portion of this decision.

Jessel, K.C., and *W. M. Cann*, for the appellant. The question for consideration is the incidence of estate duty; the testator could not by any testamentary disposition affect the claim of the Revenue which became effective on his death. The character of the estate for fiscal duties is that with which it is impressed at the time of the death, quite irrespective of the question whether or not there has, in the events which have happened, been any actual conversion into personalty: *Attorney-General* v. *Hubbuck*. (1)

This being a trust for conversion created by a deed, the property is impressed with the character of personalty immediately upon the execution of the deed, and unless the whole purpose for which conversion was directed fails from the moment of the delivery of the deed, it retains this character and does not result to the settlor as real estate: *Clarke* v. *Franklin* (2); *Griffith* v. *Ricketts*. (3) Eve J. has already decided this point in our favour.

[COZENS-HARDY M.R. Speaking for myself, I am not satisfied that the conclusion arrived at by Eve J. on this first point is correct. In the events which have happened there is no enforceable trust for sale. The executors could not in former days have filed a bill against the heir-at-law to enforce a sale: *Davenport* v. *Coltman*. (4) If this is the correct view of the construction of this settlement, the question of reconversion by will does not arise.

FARWELL L.J. There was in fact no conversion at the date of the deed or afterwards.]

It is not a question of actual physical conversion from realty into personalty, but whatever be the time at which that conversion is to take place, whether in the settlor's lifetime or after his death, the settlor by a deed of this description in effect limits this property to himself as personal property: *Griffith* v. *Ricketts*. (3) And the settlor by devising his interest in his Lincolnshire estates could not work a reconversion.

(1) 13 Q. B. D. 275.
(2) 4 K. & J. 257.
(3) (1849) 7 Hare, 299.
(4) (1842) 12 Sim. 610.

C. A.
1908
GRIMTHORPE (LORD), *In re.* BECKETT *v.* GRIMTHORPE (LORD).

[FARWELL L.J. referred to *Stead* v. *Newdigate*. (1)]

P. O. Lawrence, K.C., and *Lyttelton Chubb*, for the respondents, persons interested in the residuary estate, were not called upon.

COZENS-HARDY M.R. It might be sufficient to say that I think the decision of Eve J. was correct on the assumption that the learned judge's view of the effect of the trust in the marriage settlement, to which I must refer in a minute, was what he says it was—that is to say, that the trust for conversion was effective and operative. Even on that assumption I think it was competent to the settlor to do that which he did by his will and codicil, namely, deal with this property as real estate, which in fact it was, and say that it should be taken in fee. But as the matter has been argued I think it right to say that in my view the first proposition ought to be decided in a different way from that in which Eve J. decided it, and that alone is enough to dispose of this appeal. It is a point of some interest and requires some consideration.

Under the marriage settlement of 1845 Lord Grimthorpe settled, with the concurrence of the prior tenant for life, an estate of which he was tenant in tail in remainder, and the effect of that settlement—the language is quite clear—is that after, and only after, the death of his two parents and the death of the settlor the trustees of this settlement were to sell the property. The settlor, who survived both his parents, was legal tenant for life. The trustees had no estate, no power, no duty, until the death of the settlor as the survivor of himself and his two parents. What were the trusts of this property which they were to sell on his death? Subject to a power of appointing a sum of 10,000*l.* for his own benefit (which was really part of his own property), and subject to a power to make provision for his widow (which was irrelevant in the events which happened, because his wife predeceased him, and he never married again), the property was given to the children of the settlor, not, as is usual, to the children of the particular marriage, but to his children generally. In fact, he died without ever having had any issue, and the ultimate trust in the event of there being no

(1) (1817) 2 Mer. 521, 531.

child of the settlor was for him, "his executors, administrators, and assigns." What was the result? The property could not be sold until after the settlor's death. At the very moment that the trustees came into possession, and when alone any duty or power was vested in the trustees, there was no enforceable trust; for I think it is well settled that as between the executors and the heir, or, putting it more generally, between the real and personal representatives of a deceased person, there is no equity. Or, in other words, the executors could not have maintained an action, on the settlor's death, against the heir-at-law requiring him to sell the property and to pay the proceeds over to the executors as part of the settlor's residuary estate. This seems to me to be reasonably plain in principle, and I think there is ample authority for it, the real test being this: Aye or No, was there an enforceable trust for sale? If there was, then, no doubt, conversion would take place, and would take place with all its full consequences and effects; but if there was no enforceable trust for sale, then the property is, to use a phrase which is commonly found in some of the old authorities, "at home." It was real estate de facto, and the Court will not, in favour of the personal representative and as against the real representative, convert it into money. The case of *Davenport* v. *Coltman* (1), which I mentioned in the argument, seems to me to be, if necessary, a sufficient authority on that point.

We have been pressed with the case of *Attorney-General* v. *Hubbuck* (2) and with the case of *Clarke* v. *Franklin* (3) and other cases, but they are broadly distinguished from the present by that which is the vital difference; in all those cases there was an enforceable trust; there were people who could require the property to be converted, and the trustees had both a power and a duty to discharge; and then the doctrine of notional conversion applied, with all its full consequences. When once you get to this fact, that there was no human being who from the first moment when the trust came into operation till the present day could have enforced the trust for sale, it seems to me that the whole argument fails, and that this was, in the events which

(1) 12 Sim. 610. (2) 13 Q. B. D. 275.
(3) 4 K. & J. 257.

C. A. 1908

GRIMTHORPE (LORD), *In re.* BECKETT *v.* GRIMTHORPE (LORD).

Cozens-Hardy M.R.

have happened, real estate of the settlor which passed under his will as such.

In saying this, of course I do not in the least desire to differ from what Eve J. said on the other part of the case. I have only dealt with this point because logically I think it is the first mode of approaching it, and next because I have the misfortune to differ from the view which Eve J. took upon this point. The result is that, in my opinion, this appeal fails.

FLETCHER MOULTON L.J. I am of the same opinion, and I agree with all that has been said by the Master of the Rolls. So far as the decision of the case is concerned, it appears to me sufficient to say that the language of the will and codicil, fairly construed, points, in my opinion, to an intention to leave this property as an estate in fee—that is to say, as real property. That being so, the decision of Sir William Grant in *Stead* v. *Newdigate* (1) carries the respondent the whole way, because that learned Master of the Rolls laid down, in a case somewhat similar to the present, but by no means so strong, that it was possible for the testator to leave property as real estate if he chose to make it clear by his will that it was his intention to do so, there being in that case a trust for conversion, as there was a trust here.

FARWELL L.J. I agree. In my view the point which was so elaborately dealt with by Eve J. is a merely academic one; I do not think it arises. I do not think it can be doubted from Sir William Grant's statement in *Stead* v. *Newdigate* (1) that in a case such as that was, which is far stronger than the present (because the widow there survived the tenant for life), it is competent to a testator to declare by his will that property, subject to a trust for sale, should be taken, when it came to the persons taking under his will, as real estate. Eve J. has decided, in fact, and I entirely agree with him, that the settlor did dispose of this as real estate. That being so, I confess that I fail to see the relevancy of the argument which has been pressed upon us, though I agree with the Master of the Rolls in thinking that where there is no one who has any right or equity

(1) 2 Mer. 521.

to enforce a trust for conversion, it can no longer be treated as operative.

We were pressed by the possible claims of the Crown. It is conceded that it makes no difference in pounds, shillings, and pence to the Crown whether this property is taken as realty or personalty; and therefore the suggestion seems beside the mark. But in my opinion the Courts have never considered a possible claim by the Crown as affecting the construction of a document inter partes. If the Crown has any claim on the estate, it puts it forward in independent proceedings and asserts it to the best of its power; but, as between parties, the fact that on one construction the Crown would take something and on another it would not is not a relevant argument, as the Courts do not decide questions of construction so as to swell the receipts of the Exchequer, but so as to give effect to the true intent expressed in the document before them.

I therefore, on these grounds, agree with the decision come to by Eve J., and think that this appeal should be dismissed with costs.

Solicitors: *Meynell & Pemberton; Greenfield & Cracknall.*

W. C. D.

C. A.
1908
Oct. 27.

In re BRUCE.
LAWFORD *v.* BRUCE.

[1907 B. 421.]

Administration—Statute-barred Debt owing to Estate—Residuary Legatee of Debtor's Estate also a Legatee of Creditor's Estate—Bringing into Account.

J. B., entitled to a share in the residuary estate of his father, was also the sole residuary legatee and one of the executors of his aunt, who was a debtor for 200*l.* to the father's estate. This debt was long ago statute-barred:—

Held, that this debt and interest need not be brought into account as against J. B.'s share in his father's residuary estate.

Courtenay v. *Williams*, (1844) 3 Hare, 539; on appeal, (1846) 15 L. J. (Ch.) 204, distinguished.

Decision of Neville J., [1908] 1 Ch. 850, reversed.

Appeal from a decision of Neville J. (1)

The testator, who died in 1882, devised and bequeathed his real and residuary personal estate to trustees upon trust (in the events which happened) for his widow for life, and after her death upon trust for his seven children in equal shares. James Bruce was one of these children.

In 1906 the testator's widow died. Some old papers of the testator's were then found, from which it appeared that in the year 1878 he had lent his sister, one Emily Gordon, 200*l.* at 5 per cent. interest, and that no payment or acknowledgment in respect of either principal or interest had been made since 1880.

The said Emily Gordon had died in 1903, having bequeathed the residue of her personal estate to the said James Bruce and having appointed him one of her executors. The said Emily Gordon's will had been proved by both executors, her estate had been wound up, and James Bruce had received the residue of her personal estate, which amounted to about 5000*l.*

The plaintiffs, the present trustees of the testator, had distributed and paid over his residuary estate, other than the

(1) [1908] 1 Ch. 850.

one-seventh share payable to the said James Bruce, which amounted to about 1700*l.*

The present summons was taken out by the trustees for the purpose of determining whether or not the said James Bruce was bound to bring the 200*l.* debt with interest from 1880 into account against his one-seventh share of the testator's estate.

Neville J. held that the principle of *Courtenay* v. *Williams* (1) applied, and that James Bruce must bring the debt and interest into account against his share in his father's residuary estate.

James Bruce appealed.

Levett, K.C., and *E. Beaumont*, for the appellant. James Bruce never was at any time a debtor to his father's estate. The right to follow the assets depends upon whether there was due from the legatee a debt for which, but for the Statute of Limitations, he could have been sued: *In re Wheeler.* (2)

[They were stopped.]

J. M. Gover, for the other residuary legatees. This debt and the interest form part of the assets which James Bruce has received as residuary legatee of Emily Gordon; he therefore has part of the testator's assets in his hands, and but for the Statute of Limitations the trustees could have followed the assets and have recovered this debt: *Hunter* v. *Young.* (3) The right to follow assets is an equitable right: *Blake* v. *Gale* (4); and the trustees are entitled to say "You have in your hands this debt which has never been paid to our testator's estate, and it must therefore be brought into account before you take your share of our testator's estate." The principle of *Courtenay* v. *Williams* (1) therefore applies.

[FARWELL L.J. referred to *Harrison* v. *Kirk.* (5)]

Apart from the Statute of Limitations there is no reason why the trustees should not be allowed to follow the assets in the hands of this residuary legatee and make him account. *Ex parte Morier* (6) and *Freeman* v. *Lomas* (7) are distinguishable. There

(1) 3 Hare, 539; on appeal, 15 L. J. (Ch.) 204.
(2) [1904] 2 Ch. 66.
(3) (1879) 4 Ex. D. 256.
(4) (1886) 32 Ch. D. 571.
(5) [1904] A. C. 1, 7.
(6) (1879) 12 Ch. D. 491.
(7) (1851) 9 Hare, 109.

C. A. 1908

BRUCE, *In re.* LAWFORD *v.* BRUCE.

is an equitable liability to pay which ought to be enforced by bringing this debt into account.

Warlters Horne, for the trustees.

COZENS-HARDY M.R. In this case I am unable to agree with the decision at which Neville J. has arrived. The material facts are very simple. [His Lordship stated them, and continued]:— The claim which is raised in the action is this: "You, James Bruce, are not entitled to be paid in full your share of your father's estate, because you must deduct from that share the amount of the statute-barred debt which was due from Emily Gordon and from her executors after her death." It is sought to support that view by reference to the well-known decision in *Courtenay* v. *Williams*. (1) First of all, what was *Courtenay* v. *Williams?* (1) It was a case in which the legatee under the will was directly and legally a debtor of the testator's estate. True, the Statute of Limitations had barred the remedy, but the legal liability remained, and could be enforced in various ways which are indicated by the Court, e.g., a lien on any moneys she could get hold of later on, and the Court there said, "You cannot claim payment in full of the assets because you, in respect of your legal liability, must be regarded as having an asset of the estate in your hands for which you must account," or, in other words, you must be considered, to the extent of those assets, to have paid yourself. Neville J. in his judgment treated it in this way. He said: "It seems to me that the trustees of the testator's estate are entitled to say to him, 'You have in your hands, as residuary legatee of your aunt, this debt which with interest has remained due from her and has never been paid to the testator's estate and ought to be accounted for.'" I am entirely unable to follow that. There was at no time the legal relation of debtor and creditor between James Bruce as residuary legatee and the testator. It is quite true there might have been, apart from the Statute of Limitations, a right in the creditor to follow the assets in the hands of the residuary legatee, but that right has been plainly lost by the Statute of Limitations, and, there being no possibility of bringing an action in equity against

(1) 3 Hare, 539; 15 L. J. (Ch.) 204.

James Bruce, I fail to see any foundation for the doctrine which is relied upon. No part of Emily Gordon's assets has been appropriated or has been retained in respect of this debt, and there is no foundation, as it seems to me, for the suggestion that James Bruce, in his character of residuary legatee, ever was liable, in the sense of being equitably liable, to pay this debt. There was no legal liability, and a Court of Equity always considers that it must regard all the circumstances of the case; it considers the question of laches and all such matters before it makes an order to refund and do what is just and right between the parties. In the present case, I can scarcely bring myself to doubt that this is a case in which those equitable considerations ought to have been applied, if the Court had been asked to follow assets in this case. But this is not a case of following assets at all. There was never any time when there was any legal liability, and the whole foundation of *Courtenay* v. *Williams* (1) was that there was a legal liability. With great respect to the learned judge, I think his decision was wrong and that this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion.

It appears to me that the argument of counsel for the respondents is based upon a false conception as to the nature of the remedy of following assets. It is a remedy given by equity to enable persons who have not enforced their debts before the distribution of the estate was complete to follow the assets into the hands of those who had received them under the administration. But that was always an equitable remedy, and it was only applied where the Court thought it equitable to do so, and the consequence is that the right of the creditor against the assets in the hands of the people who had received them commenced with the judgment. Until then he was only a person applying to the Court to give him relief as against those assets.

In the present case the respondents seek to assume that that relief would have been given, and that the assets in the hands of James Bruce would have been made liable to pay this statute-barred debt. They could not have sought that relief

(1) 3 Hare, 539; 15 L. J. (Ch.) 204.

C. A. 1908 BRUCE, *In re*; LAWFORD *v.* BRUCE. Fletcher Moulton L.J.

themselves, because the Statute of Limitations would have applied. In my opinion you cannot in that way hypothesize the decision of a Court of Equity, on an equitable claim brought before it, so as to treat the claim as already established, and treat these assets in the hands of James Bruce as being assets liable to pay the statute-barred debt.

It follows, therefore, that the trustees have no right of retention at all, because there was no moment at which James Bruce was either equitably or legally indebted to the original testator's estate.

FARWELL L.J. I am of the same opinion. Neville J. has founded himself on *Courtenay* v. *Williams* (1), but in my view that case has no application. Assume that the executor in this case was a different person from the residuary legatee; it is plain that, as executor, there is no liability on him personally for the debt that is claimed. But *Courtenay* v. *Williams* (1) depends on the legal liability of the executor as such, which remains although the remedy is taken away by the statute. In order to give effect to that legal liability and satisfy it, the Court held in *Courtenay* v. *Williams* (1) that the amount received might be treated as paid in respect of that debt; it proceeded on the footing of the existing legal liability. In the present case there is no existing legal liability in the residuary legatee at all. The utmost is an equitable liability, which is explained so lucidly by Lord Davey in the passage I referred to during the argument in *Harrison* v. *Kirk* (2)—a purely equitable right of following assets. But, inasmuch as there is no pre-existing legal right against the residuary legatee, no reasoning founded on the existence of such a right as there was in *Courtenay* v. *Williams* (1) can be applicable to the present case. It then becomes a mere question of whether it is equitable, taking into consideration the various matters mentioned by Lord Davey, such as laches, acquiescence, and the like, to enforce the claim. I cannot doubt that it would be wrong to allow a debt of this sort, nearly thirty years old, on which, as far as we know, no interest was ever paid—a debt which may have been paid off or released

(1) 3 Hare, 539; 15 L. J. (Ch.) 204. (2) [1904] A. C. 1, 8.

years ago—now to be set up in this way on what I can only call a misapplication of the principle on which *Courtenay* v. *Williams* (1) was decided.

Solicitors: *Pollock & Co.; Fladgate & Co.*

W. C. D.

In re HARRINGTON.
WILDER *v.* TURNER.

[1903 H. 3049.]

Affiliation—Bastardy Order—Weekly Payment—Death of Putative Father—Enforcement of Order—Liability of Father's Estate—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

The liability of the putative father under a bastardy order is purely personal; and if the father dies the mother has no right to claim against his estate either arrears or future payments.

ADJOURNED SUMMONS.

This was an application by a married woman that she might be allowed to rank as a creditor upon the estate of C. D. M. Harrington, deceased, for the sum of 37*l.* and for a further sum of 119*l.* 4*s.*

On September 4, 1896, an order was made by two justices of the peace for the borough of Portsmouth, by which, after adjudging C. D. M. Harrington to be the putative father of the applicant's female bastard child, who was born in June, 1896, it was ordered "that the said C. D. M. Harrington do pay unto the said ——" (the applicant) "the mother of the said child so long as she shall live and shall be of sound mind and shall not be in any prison or to the person who may be appointed to have the custody of such child under the provisions of the Poor Law Act, 1844, the sum of 5*s.* per week for the maintenance and education of the said child henceforth until the said child shall attain the age of sixteen years or shall die." The weekly payments were made for some years, but when C. D. M. Harrington died in 1903 they had been unpaid for

(1) 3 Hare, 539; 15 L. J. (Ch.) 204.

WARRINGTON J.
1908
HARRINGTON, *In re.*
WILDER *v.* TURNER.

some time, and the arrears amounted to 37*l.* The 119*l.* 4*s.* was the aggregate amount of the weekly payments which would accrue from his death to the date when the child would attain the age of sixteen.

George Hart, for the applicant. We are entitled to payment of the arrears and to have the weekly payments after C. D. M. Harrington's death paid or provided for. The order was made under s. 4 of the Bastardy Laws Amendment Act, 1872, and it is true that the justices had no power to make any order against the representatives of the father, and the order was made on him alone for payment to the mother of a weekly sum. But that order created a debt. The object of the Act was to relieve the rates from the burden of keeping the child, not to impose a penalty on the father; and this is a question of debt, not of tort. The death of the father is immaterial; the thing to be considered is not his death, but the need of maintenance for the child: ss. 3, 4, 5 of the Act of 1872. No doubt s. 4 provides personal remedies against the father, but it refers to the sum ordered to be paid as "due"; in other words, it refers to it as a debt. That this is a debt is shewn by the circumstance that it was found necessary in s. 10 of the Bankruptcy Act, 1890, to provide that affiliation orders should not be released by the discharge of a bankrupt. Proceedings on a bastardy summons are in the nature of a civil suit: *Reg.* v. *Lightfoot* (1); *Reg.* v. *Berry.* (2) The procedure is founded on the poor law, and the motive is not to impose a punishment, but to benefit the child: Poor Law Amendment Act, 1844, ss. 4, 5, 6, 7, 8. By s. 5 of that Act "all money payable under any order as aforesaid shall be due and payable to the mother"; so that in that Act also it was treated as a debt. The death of the father is not referred to. The provision in the Army Act, 1881, s. 145, that no execution shall issue against a soldier in respect of such a liability, shews that it is a debt. At the date of C. D. M. Harrington's death we had a right of property in the 37*l.* at all events. There is no case on the point, but the text-book writers agree that the liability under an affiliation order is purely personal, and that

(1) (1856) 6 E. & B. 822. (2) (1859) 28 L. J. (M. C.) 86.

if the father dies the mother has no claim against his estate. But there is no authority for these statements, and we submit that they are wrong. In Martin's Law of Maintenance, Desertion, and Bastardy, 2nd ed., and Lushington on Affiliation and Bastardy, 2nd ed., no authorities are cited. In Saunders' Law and Practice of Affiliation, 10th ed. at p. 144, two cases are referred to, but they do not support the proposition. *Doe* v. *Bridges* (1) only says that where an Act creates an obligation and enforces the performance in a specified manner it is a general rule that performance cannot be enforced in any other way; and *Stevens* v. *Jeacocke* (2) is to the same effect. That rule does not affect us, for we have no statutory remedy. The statutory remedy against the father ceased, as regards part of our claim at all events, at his death and is no longer available. Therefore we have the ordinary rights of a creditor against his estate. A contract has been created, and nothing has happened to diminish the father's liability. It has been held in *Ruttinger* v. *Temple* (3) that an action cannot be maintained against the administrator of the mother of a bastard child for the maintenance of the child after the death of the mother. In that case, however, there was nothing resembling a bastardy order, and it was a question under the Poor Law Acts.

S. G. Lushington, for persons beneficially interested in C. D. M. Harrington's estate; *A. C. Nesbitt*, for the administratrix of the estate; and *H. P. Rashleigh*, for a mortgagee, were not called upon to argue.

WARRINGTON J. In my opinion this is a perfectly hopeless application. The claim is by the mother of a bastard child to prove as a creditor against the estate of the putative father, first in respect of arrears of a weekly sum payable under an affiliation order accrued due prior to the death of the father, and secondly for an amount which is said to have accrued due under the order since the death of the father, or which will accrue due up to the date when the child attains the age of sixteen. The facts are very short. [His Lordship stated them.] The child is still alive, and

(1) (1831) 1 B. & Ad. 847, 859. (2) (1848) 17 L. J. (Q. B.) 163.
(3) (1863) 4 B. & S. 491.

WARRINGTON J.
1908
HARRINGTON, *In re.*
WILDER *v.* TURNER.

if the father were living the weekly sum would be still payable by him. The order was made under the Bastardy Laws Amendment Act, 1872. The only section which is material is s. 4, which provides for the making of such orders under circumstances detailed in the section. [His Lordship read the section.] This is a claim against the estate of a deceased person and must be clearly made out. In order to succeed the existence of a debt must be proved. The claimant must establish that she has a debt and is a creditor of the deceased; that there was a sum due to her which she could recover by action. It is a well-known principle of law, established by many authorities, that if a statutory obligation is imposed and a statutory mode for enforcing it is provided by the same statute, the intention of the Legislature is that that shall be the only mode of enforcing it, and that it shall not be enforced by ordinary process of law. That is the case here. The justices under s. 4 order that the putative father shall pay a weekly sum, and in the same section there are elaborate provisions for enforcing payment. So far as the authorities go, there is no authority directly in point except the general authorities to which I have referred; but the statements of the law by the text-book writers are unanimous. No case is referred to by them which directly supports the proposition that the liability under an affiliation order is purely personal, and that if the father dies the mother has no claim against his estate, but still less is there any case in which the holder of such an order has been allowed to prove against the estate of a deceased father. And the reason why no such claim has ever been admitted is that no one hitherto has been bold enough to assert the right. The mother has no means of recovering any of these sums, because, inasmuch as the statutory mode of enforcing the payment has ceased, the obligation, which is in terms only an obligation on the father himself and ceases with his life, must cease also. There is no right to recover either the arrears or the amount of the subsequent weekly payments, and the claim must be rejected. There will be no order on the summons as to costs or otherwise.

Solicitors: *Norris & Martin; Hammond & Richards; Wadeson & Malleson.*

H. C. R.

In re JACOBS.
BALDWIN *v.* PESCOTT.

[1908 J. 189.]

Practice — Costs — Compulsory Purchase — Money in Court — Payment out — Failure of Part of Summons—Order to pay Interest—Costs of obtaining Order—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 76, 80.

By an originating summons issued in respect of a fund in Court, which represented the purchase-money of houses which had been taken compulsorily, the plaintiffs asked for inquiries as to children, a declaration on the construction of a will, payment out of the fund in accordance with the result of the inquiries and declaration, and that the costs might be paid by the promoters of the undertaking. An order was made to the effect that a sum representing interest should be paid to the plaintiffs, and that the promoters should pay to the plaintiffs and another respondent "their costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order and of all proceedings relating thereto":—

Held, that the costs payable by the promoters did not include all the costs incurred in connection with the parts of the summons which had failed, but must be confined to the costs of obtaining the particular order which was made.

Summons to review taxation.

F. T. Pescott was under the will of G. Jacobs entitled for his life to an annuity of 10*l.* out of the rents and profits of two houses at Deptford, and his children were interested in the property subject to the annuity. He became bankrupt, and his life interest was assigned in 1855 to J. Baldwin, who entered into possession of the houses and thenceforward received the whole of the rents and profits, which, however, did not amount to 10*l.* a year. In 1887 the Metropolitan Board of Works took the houses under compulsory powers and, not being satisfied with the title of Baldwin, who claimed the property under the Statutes of Limitation, paid the purchase-money, 230*l.*, into Court under s. 76 of the Lands Clauses Consolidation Act, 1845. Baldwin took no further action and died in 1899. F. T. Pescott died in 1902. Nothing was done till in January, 1908, an originating summons was taken out by Baldwin's executors as plaintiffs against F. T. Pescott the younger and the London County

WARRINGTON J.
1908
JACOBS, *In re.*
BALDWIN *v.* PESCOTT.

Council as defendants. At this time the plaintiffs claimed that Baldwin's estate was absolutely entitled to the property, or at all events that on the true construction of Jacobs' will the annuity was payable and should be made good out of corpus. The summons was intituled in the matter of the trusts of the will of G. Jacobs, deceased; ex parte the Metropolitan Board of Works the account of J. Baldwin and all others interested in the houses; and in the matter of the Artizans and Labourers Dwellings Improvement Acts, 1875 to 1885 (1); and in the matter of the Metropolis (Hughes Fields, Deptford) Improvement and Provisional Order Confirmation Act, 1885. The summons asked "(1.) that for the purposes of this application the defendant F. T. Pescott may be appointed to represent the child or children and issue of the said F. T. Pescott deceased and their respective legal personal representatives (if any), all of whom are referred to in the inquiry next hereinafter mentioned; (2.) an inquiry who were (*a*) the son or sons of the said F. T. Pescott deceased who attained the age of twenty-one years, also (*b*) the lawful issue of any son or sons of the said F. T. Pescott deceased who died before the age of twenty-one years leaving lawful issue, and (*c*) the daughter or daughters of the said F. T. Pescott deceased who attained the age of twenty-one years or married, also whether any and which of them are now dead, and, if so, who are their legal personal representatives respectively; (3.) that it may be determined and declared on what principle and in what shares and proportions and in what manner the sum of 327*l.* 5*s.* money on deposit and 9*l.* 6*s.* cash or other the money and cash in Court to the credit of the above mentioned account ought on the true construction of the will of the above named testator and in the events which have happened to be divided between the plaintiffs and the aforesaid child, children, or issue of the said F. T. Pescott deceased; (4.) payment out of the fund in Court in accordance with the result of the said inquiry and with the declaration to be made as aforesaid; (5.) that the costs of and consequent on this application may be paid by the defendants the London County Council or otherwise provided for."

(1) The title of the Act of 1885 is "Housing of the Working Classes Act."

When the summons came before the Master on February 26, 1908, an objection was taken that the plaintiffs had no right to anything beyond the interest or dividends on the fund during the life of F. T. Pescott, deceased, and that they had no interest in ascertaining who were the persons interested after the cesser of that life estate. The Master took that view and made an order "that the funds in Court be dealt with as directed in the schedule hereto; and it is, pursuant to the 80th section of the Lands Clauses Consolidation Act, 1845, ordered that the London County Council do pay to the applicants and to the respondent F. T. Pescott their costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order and of all proceedings relating thereto, such costs to be taxed by the taxing Master in case the parties differ." The schedule provided that, notwithstanding that the funds in Court had not been dealt with for upwards of fifteen years, the sum of 83*l.* 11*s.* 5*d.* should be paid to the plaintiffs out of the money on deposit and cash, and that the residue should be invested and accumulated in new Consols. This sum of 83*l.* 11*s.* 5*d.* represented interest on the funds from 1887 to the death of F. T. Pescott, but the order contained no statement to that effect.

The taxing Master proceeded to tax the plaintiffs' bill of costs, amounting to 61*l.* 1*s.* 10*d.*, from which he taxed off 8*l.* 10*s.* In so doing he allowed many items to which the London County Council objected on the ground that the taxing Master had not taxed in accordance with the order made. They contended that the order made was for payment of interest on the fund and that the costs ought to be confined to that issue; that the summons had asked for many other things and that the plaintiffs had failed on these claims and were not interested in any part of the capital; that on these claims the summons was misconceived, and that all items relating to them ought to be struck out; for instance, inquiries as to the representatives of F. T. Pescott and the assets of Baldwin, and the endeavour to secure the right to act for the persons interested after the death of F. T. Pescott and to obtain the administration of Jacobs' will. They objected, amongst other items, to the whole of the first eleven pages of the bill on the above grounds.

WARRINGTON J.
1908
JACOBS, *In re.* BALDWIN *v.* PESCOTT.

In his answers to the London County Council's objections the taxing Master said: "It is quite true that the order eventually made was not the order originally asked for, but the plaintiffs in this application being the executors of the will of J. Baldwin are entitled to be paid their costs, including all reasonable charges and expenses of obtaining this order and of all proceedings relating thereto. The costs and charges objected to on pages 1 to 11 are in my opinion the same as would have been necessarily incurred if the summons had asked for an order for payment of interest alone in the first instance, and such costs and charges would not have been less had such been done. The allowances made by me are in my opinion reasonable and proper. I do not consider that there was any 'adverse litigation' in this case, and I have allowed no costs which can be said to have been incurred by any such litigation. Under the circumstances of this case I am of opinion that the remaindermen were properly joined in the first instance. I have heard the arguments of both parties by their respective solicitors and given the matter careful consideration, and I have in the exercise of my discretion allowed fair and proper charges and expenses in this taxation pursuant to the said order, and I therefore disallow the whole of the objections made to my taxation."

The London County Council took out a summons asking that the taxing Master might be directed to vary his certificate.

Christopher James, for the summons. The order of February 26, 1908, was really a common order for payment of dividends to representatives of a tenant for life and the investment of the fund. The costs to be paid are the costs of obtaining that particular order, and the taxing Master ought not to have allowed any costs caused by that part of the originating summons which failed. The bill is largely made up of costs incurred by the plaintiffs in obtaining advice on the construction part of the summons, and those items ought to be struck out. It is true that the order contains no determination of any question nor any statement that the 83*l.* 11*s.* 5*d.* represented interest, but there is no doubt what it means. We do not ask the Court to allow or disallow any particular items, but to send the bill back

to the taxing Master. He is bound by the order and has no discretion to go into any matters not relating to the order. It is not a question of quantum or discretion, but a question of principle.

Crossfield, for the plaintiffs. The Master is right. All the items objected to were for costs necessarily incurred before we could take any proceedings at all. It was absolutely necessary, for instance, for us to obtain a copy of Jacobs' will and to ascertain what were the interests of the Pescotts in the property. We thought at first that we were entitled to the whole fund, and we hoped throughout to recover not merely the interest on the fund, but the whole of the annuity during F. T. Pescott's life. In order to litigate that claim the remaindermen had to be ascertained and represented. The order was an adjudication by the Master on our rights. He determined that we were only entitled to the interest, and to do that he had to construe the will and decide what the rights of the parties were.

The direction to pay costs is in the usual form: Seton's Judgments and Orders, 6th ed. vol. iii. p. 2457. This is an order for payment out of Court, and the direction to pay costs is made under s. 80 of the Lands Clauses Consolidation Act, 1845. The costs now objected to are not costs of adverse litigation, but costs arising in the course of administering the purchase-money under the Act, and ought to be paid by the county council: *Askew* v. *Woodhead*. (1) No costs have been occasioned by the prayer for inquiries in the summons, and the important question (3.) has been "determined" by the order although it has not been "declared." The determination of questions of construction is not adverse litigation, and the costs of it must be paid by the promoters of the undertaking. The order has given us an amount with which we are satisfied, and the fact that by a slip it does not contain any actual declaration of rights is no reason for depriving us of costs. The order has not been appealed from and must be taken to be in the right form.

No reply was called for.

WARRINGTON J. I think the Master has proceeded on a wrong footing. This is a case in which the applicants were

(1) (1880) 14 Ch. D. 27, 36.

WARRINGTON J.
1908
JACOBS, *In re.* BALDWIN *v.* PESCOTT.

entitled to an annuity charged upon certain lands which were taken by the Metropolitan Board of Works. It appears that at the time the lands were taken the testator of the applicants, who are his executors, was in possession of the lands, and he raised some question alleging that he was entitled to the land by virtue of the Statutes of Limitation. That question having been raised, the Metropolitan Board of Works paid the purchase-money for the land into Court. That was in the year 1887. Baldwin, the person entitled to the annuity, made no application for payment out of any part of the fund or of the income of the fund, and the person during whose life the annuity was payable died in 1902. Then in 1908 the present applicants, who are the executors of Baldwin, woke up to see what their rights were with regard to this fund, and they obtained advice, made inquiries, and ultimately caused to be issued an originating summons in which they asked for a number of inquiries to ascertain who were the people entitled to the fund. On that summons coming into Court, and after a certain number of affidavits had been filed, the Master or the judge in chambers made this order on February 26, 1908: "It is ordered that the funds in Court"—I am reading simply the ordering part—there is no declaration of title, nothing about that—"it is ordered that the funds in Court be dealt with as directed by the schedule hereto, and it is pursuant to the 80th section of the Lands Clauses Consolidation Act, 1845, ordered that the London County Council do pay to the applicants and to the respondent F. T. Pescott their costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order, and of all proceedings relating thereto, such costs to be taxed by the taxing Master." Then, when one looks at the schedule, the only substantive order that is made is to pay to the applicants 83*l.* 11*s.* 5*d.* and to invest the residue of the fund in Consols and accumulate them. That is all. Now all the taxing Master has to do is to tax the costs of obtaining this order, including in the costs all reasonable charges and expenses incident thereto and the proceedings relating thereto. What are the costs of obtaining this order? For the purpose of obtaining this order it may have been necessary to take some proceedings to ascertain who was to be brought before the Court

as representing the corpus of the fund. I think it probable that it would have been impossible even to have obtained the income of the fund without serving somebody who claimed to be entitled to the corpus; but it was not necessary to incur any costs whatever arising out of the contention that the applicants were entitled to the whole of the fund either on the true construction of the will, by which they sought to say the annuity was charged on the corpus, or otherwise. I think the matter must go back to the taxing Master to reconsider his taxation on the footing of an expression of opinion by me that he is to confine himself to allowing to the plaintiffs the costs which were incurred in obtaining the particular order that was made, namely, an order which binds nobody except so far as the 83*l.* 11*s.* 5*d.* is concerned—an order merely directing payment of the 83*l.* 11*s.* 5*d.* and the investment of the residue in Consols. I think those are the costs which the London County Council ought to pay, and no more.

Leave to appeal was refused.

Solicitors: *E. Tanner, Solicitor to the London County Council; Syrett & Sons.*

H. C. R.

WARRINGTON J.

1908

Oct. 16.

In re NATIONAL STARCH COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK.

Trade Mark—Registration — Distinctive Mark — Registrable Trade Mark—Adapted to distinguish—Confusion with other Goods—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 8; *s.* 9, *sub-s.* 5; *s.* 39—*Trade Marks Rules*, 1906, *r.* 39.

Application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the word "Oswego" alone in class 42 in respect of corn flour. The applicants were an American company with factories at Oswego, in New York State. There was evidence to shew that they had sold Oswego corn flour for many years in this country, that there was no other corn flour known by the name "Oswego," that their corn flour was known to the public as "Oswego" without the use of their name, and that the name "Oswego" was known in this country through its association with their goods rather than as a geographical name.

There were on the register five other trade marks in class 42 containing the word "Oswego." Three of these belonged to the applicants and two to biscuit manufacturers who did not oppose the present application:—

Held, that the only question now before the Court was whether "Oswego" was adapted to distinguish the corn flour of the applicants from the corn flour of other persons; that the Court had not to consider whether registration of "Oswego" might lead to confusion between the applicants' corn flour and similar goods, such as oatmeal, of other persons; that the Court had power to take into consideration evidence of actual user of the trade mark; and that on the evidence in the present case there must be a declaration that "Oswego" ought to be deemed a distinctive mark in respect of corn flour.

This was an application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the word "Oswego" alone as the trade mark of the National Starch Company in class 42 in respect of "corn flour or prepared corn for use as food."

The National Starch Company were an American company carrying on business at New York, with factories at Oswego, in New York State, and distributing agents in London. They and their predecessors in title had for upwards of sixty years manufactured and sold Oswego prepared corn, otherwise Oswego corn flour, in America and in the United Kingdom. There was

evidence to shew that there was no other corn flour known by the name "Oswego," that the name "Oswego" had been exclusively associated with the corn flour manufactured by the company for many years past, that their "Oswego" corn flour was commonly known to the public as "Oswego" without the use of the company's name, and that the name "Oswego" in this country was known through its association with the company's goods rather than as a geographical name.

The company were the owners of other trade marks, namely, as a trade mark for prepared corn or corn flour made from Indian corn, a device containing the words "Kingsford's Oswego prepared corn"; another trade mark containing the words "Kingsford's Oswego prepared corn, made from American Indian corn"; and a third which included the words "Kingsford's Oswego prepared corn." The only other trade marks on the register containing the word "Oswego" were two marks on biscuit-shaped designs belonging to Messrs. Peek, Frean & Co., biscuit manufacturers (which had been registered by the applicants and sold by them to Messrs. Peek, Frean & Co.), in respect of biscuits, and the other in respect of substances used as food or as ingredients of food, except biscuits and corn flour. All these marks were registered in class 42. Messrs. Peek, Frean & Co. were large purchasers of the applicants' Oswego corn flour and did not oppose the present application.

The Board of Trade, under r. 39 of the Trade Marks Rules, 1906, required the National Starch Company to make their application in the Chancery Division of the High Court of Justice, and it now came on for hearing in the non-witness list on notice of motion that the application to the Board of Trade for the registration in class 42 in respect of corn flour or prepared corn for use as food of the word "Oswego" might be heard and determined.

A. J. Walter, K.C., and *Kerly*, for the motion. This is in the nature of a preliminary application. The question before the Court is whether the word "Oswego" is registrable within s. 9 of the Trade Marks Act, 1905. A subsequent application to the registrar, after the usual advertisements, will be necessary to

WARRINGTON J.

1908

NATIONAL STARCH COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK, *In re.*

decide whether this trade mark ought to be actually registered. We submit that "Oswego" is a "distinctive mark" within sub-s. 5 of s. 9. It is a geographical name and excluded from sub-s. 4, so this application is made under sub-s. 5. The section enables the Court to take into consideration evidence of actual user of the mark, and here the evidence is very strong that for many years our corn flour has been distinguished from that of other persons by the use of the word "Oswego."

Sargant, for the Registrar of Trade Marks. Evidence of user may be taken into consideration, but the section does not say that it is to be conclusive. We contend that this mark is not distinctive. Messrs. Peek, Frean & Co. have already two trade marks which contain the word "Oswego" registered in respect of all the substances in class 42 except corn flour. The only distinction between those marks and the applicants' mark is that the former shews the word "Oswego" on a representation of a biscuit, whereas the latter consists of the word "Oswego" alone. The distinctive part of both marks is the word "Oswego." Part of this application is already covered by the former marks. At most this trade mark should be registered for corn flour only.

[*Kerly.* We do not object to giving up the words "or prepared corn for use as food."]

That will remove one objection. But a stronger objection remains. Registration will give them a trade mark which will not be distinctive in respect of other goods. We should not object to the registration of "Oswego corn flour" instead of "Oswego" alone, and the evidence shews that they have only used the word in that way. If anybody buys their corn flour which is known as "Oswego" and makes it into biscuits he will be entitled to call them "Oswego biscuits," and that will lead to confusion between his biscuits and those of Messrs. Peek, Frean & Co. If another trader manufactures corn flour at Oswego he ought to be allowed to use the name. The object of a trade mark is not to distinguish goods, but to distinguish the goods of a particular trader. If "Oswego" is registered by itself it will create confusion in the public mind as to how far the use of the word is open to them and how far it denotes the applicants' goods. If there is a possibility of deception it ought not to be

registered: *In re Australian Wine Importers, Ld.* (1); *Eno* v. *Dunn.* (2) Under s. 9 of the Act of 1905 the registrar has a wider discretion than under the former Act. It is no longer necessary to shew that the trade mark will be calculated to deceive. The applicants cannot have this trade mark registered without the leave of the Court, and they must shew that there will be no possibility of confusion. The point is not that the public will not be able to use the name for other goods, but that confusion will be created and the public will be afraid to use it. The appropriation by the applicants of the whole use of the word "Oswego" would tend to produce confusion, and they would be trenching unduly on the right of the public to describe their goods as they please. "Oswego" without the words "corn flour" would be thought to apply to all sorts of similar goods, such as oatmeal, so it will not really distinguish the applicants' goods from those of other persons. A design can be altered so as to be distinctive, but a word cannot be treated in that way. Nobody has a right to appropriate part of the English language. The result must be to hamper other persons in the description of their goods which are food substances. They would not think it safe to use the name even for goods in other classes. It is not enough to consider whether "Oswego" will distinguish the applicants' corn flour from the corn flour of other persons; the Court must be satisfied that it will distinguish it from other goods of a similar character belonging to other persons.

Kerly in reply. We only have to satisfy the Court on this application that "Oswego" is distinctive of our corn flour. An inquiry about other goods is quite unnecessary. We only get the exclusive use of the word in class 42, so the Court will not go beyond that class. The Court has only to recognize existing facts, not to confer any rights.

WARRINGTON J. The question I have to decide is whether the word "Oswego" is a distinctive mark within the meaning of s. 9 of the Trade Marks Act of 1905. That Act provides in s. 8 that "a trade mark must be registered in respect of particular goods or classes of goods," and by s. 39 it is provided that such

(1) (1889) 41 Ch. D. 278, 281. (2) (1890) 15 App. Cas. 252, 256, 260.

WARRINGTON J.

1908

NATIONAL STARCH COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK, *In re.*

registration gives to the proprietor "the exclusive right to the use of such trade mark upon or in connexion with the goods in respect of which it is registered." Sect. 9 provides that "a registrable trade mark"—which means, I suppose, a trade mark in order to be registered—"must contain or consist of at least one of the following essential particulars." Then there are four particulars enumerated. The word "Oswego" does not fall under any of them, although certain words are included in Nos. 3 and 4 of that list, but "Oswego" does not fall within them. Then comes No. 5: "Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs 1, 2, 3, and 4, shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark."

Now what I am asked to do is to say that this particular word is a distinctive mark, that is to say, a distinctive mark capable of being registered as a trade mark in respect of particular goods. The applicants are the proprietors of a well-known corn flour which has for many years been described as "Oswego prepared corn" and known also as "Oswego corn flour," and they propose to register the word "Oswego" alone and in respect of corn flour alone. That is important, and it is for that reason that I have laid stress on the provisions of s. 8 and s. 39.

I now go back to s. 9 in order to see what is meant by the words "distinctive mark," and how, so far as that section is concerned, the Court is to be guided in determining whether a particular name, signature, or word is a distinctive mark. The section defines the word "distinctive" in this way: "For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." Pausing there for one moment, I think that shews that it is the duty of the Court, in considering whether an order ought to be made under the fifth heading of that list of essential particulars, to satisfy itself that the name or word in question is adapted to distinguish the goods of the proprietor of the trade mark from those of other persons; and, further, that the goods which are there mentioned are the only goods which are material for the purposes of this section, namely, the goods

in respect of which it is proposed to register the mark. Therefore, for the present case, what I have to determine is whether the word "Oswego" is adapted to distinguish the corn flour of the applicants from the corn flour of other persons.

Now I am not left without further guidance by the section, because it tells the Court what it may take into consideration in determining whether a word is distinctive or not. It goes on in this way: "In determining whether a trade mark is so adapted"—I think "a trade mark" there must mean the mark in respect of which the question arises, namely, the mark as to which it is alleged on the one side and denied on the other that it is distinctive, in other words the mark which it is proposed to register—in determining then whether that mark (in this case "Oswego") is so adapted, "the tribunal may, in the case of a trade mark in actual use"—there again I think that must mean "in case that which it is proposed to register is in actual use," or, putting it in another way, "in the event of the mark as to which the question arises being in actual use"—"take into consideration the extent to which such user has rendered such trade mark"—that must be the same mark—"in fact distinctive for the goods with respect to which it is registered or proposed to be registered." I am enabled, therefore, by that sub-section (the word "Oswego" being in actual use) to take into consideration the extent to which that user has rendered it in fact distinctive for corn flour, because that is the name of the goods for which it is proposed to be registered.

What then is the evidence with regard to the extent of the user of the word and the effect of that user? I have a large body of evidence, some of it going back for sixty years, during which period at least this corn flour has been on the market by the name of "Oswego corn flour," and the evidence is beyond dispute that the word "Oswego" used in connection with corn flour denotes the corn flour of the applicants. In my opinion it does not matter whether the use of the word "Oswego" alone has hitherto distinguished the corn flour of the applicants from the corn flour of other persons. It seems to me that if that word, when used either by itself or in connection with the words "corn flour," has distinguished that corn flour from the corn flour

WARRINGTON J.

1908

NATIONAL STARCH COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK, *In re.*

of other persons, that is sufficient to make the word a distinctive word.

I am only to take that evidence into consideration. I agree with Mr. Sargant that it is not to be conclusive for the purposes of this section, but I am to take it into consideration.

Now the evidence in this case is so strong (and there is no other evidence) that I am forced irresistibly to the conclusion that a word which has hitherto distinguished the goods of the applicants—which has not only distinguished them, but has been distinctive of them, so that goods with that name on them are known to be the applicants' and nobody else's—is adapted to distinguish the applicants' goods from those of other persons. I think, therefore, working out the section as I have endeavoured to work it out, and repeating that the question I have to determine is whether the word is one that is capable of being registered—is "registrable," to use the word in the section— I am bound to come to the conclusion that this word ought to be deemed a distinctive mark within the meaning of the fifth head of particulars enumerated in s. 9.

It has been said that I ought not to come to that conclusion because, if this word is deemed a distinctive mark and is registered accordingly, there may be confusion, not between the corn flour of the applicants and the corn flour of other persons, but between the corn flour of the applicants and similar goods of other persons. It seems to me that I have not that point to consider. It may well be that if "Oswego" is registered, and somebody who is going to sell oatmeal or some goods nearly resembling corn flour applies to register the word "Oswego," he will not be allowed to register it. That may well be, on the authority of those cases of *In re Australian Wine Importers, Ld.* (1) and *Eno* v. *Dunn* (2), but that seems to me to be beside the question for the present purpose. I think I have on the present occasion nothing to do except to interpret s. 9 and to determine whether, according to the true construction of s. 9 and acting under the directions which s. 9 gives me, the word "Oswego" is a distinctive mark, and, as such, adapted to distinguish the corn flour of the applicants from the corn flour of

(1) 41 Ch. D. 278. (2) 15 App. Cas. 252.

other persons. As I have said, the evidence has satisfied me that it is so adapted, and, that being so, I must make the necessary order. What exactly the form is I do not know, but I suppose it will be, following the words of the section, to declare that the word "Oswego" ought to be deemed to be a distinctive mark in respect of corn flour. The applicants will pay the registrar's costs in accordance with the former practice.

WARRINGTON J.
1908
NATIONAL STARCH COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK, *In re*.

Solicitors: *Neve, Beck & Kirby; Solicitor to the Board of Trade.*

H. C. R.

In re WALKER.
MACINTOSH-WALKER *v.* WALKER.

[1908 W. 1708.]

PARKER J.
1908
July 3, 7.

Will—Conversion—Personalty into Realty—Direction to hold Proceeds of Personalty upon the Trusts and in Manner applicable if they had arisen from a Sale under the Settled Land Act, 1882—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21; *s.* 22, *sub-s.* 5; *s.* 24, *sub-s.* 3.

Although the Legislature can, by a simple enactment to that effect, make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty, an individual can only do so by the creation of an imperative trust for the conversion of the personalty into realty and for the settlement of that realty to uses which will secure the devolution or create the estates desired to be created.

A declaration that personalty shall devolve or pass to persons successively as realty (although in cases of doubtful construction it may help the Court to construe the instrument as creating an imperative trust for conversion) is not, per se, operative, and a bequest of personalty on trust for sale and to hold the net proceeds "upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of" freehold hereditaments by the same will "devised in settlement, under the Settled Land Act, 1882," is not an imperative trust.

Where, therefore, the freeholds referred to had been strictly settled, a person who had become entitled to an estate tail in them was held to have become entitled to the personalty bequeathed without executing a disentailing assurance.

By his will, dated May 26, 1887, Thomas Walker bequeathed certain specific and pecuniary legacies, and devised all his

PARKER J.
1908
WALKER, *In re.* MACINTOSH-WALKER *v.* WALKER.

freehold hereditaments to the use of his first and other sons successively in tail, with remainder to the use of his daughters in equal shares as tenants in common in tail, with cross-remainders between them in tail, and with remainders over.

And the testator thereby devised all his copyhold and customary hereditaments to the use of the trustees of the will and their heirs according to the customs of the respective manors, on such trusts and with and subject to such powers and provisions as should correspond with the uses, powers, and provisions thereinbefore declared and contained concerning the freeholds, or as near thereto as the tenure and quality of the premises would permit.

And the testator thereby bequeathed all his leasehold premises to the trustees, upon trust, subject to the payment of the rents and observance of the covenants reserved by and contained in the leases, to hold the same on such trusts and with and subject to such powers and provisions as should correspond with the uses, powers, and provisions thereinbefore declared and contained concerning the freeholds, or as near thereto as the tenure and quality of the premises would permit, but so that the leaseholds held on lease for years or any undivided share thereof should not vest absolutely in any person thereby made tenant in tail by purchase of the freehold hereditaments, unless he or she should attain the age of twenty-one years, but on his or her death under that age should go and devolve in the same manner as if they had been freeholds of inheritance included in the settlement thereinbefore contained.

And the testator thereby bequeathed to the trustees all his residuary personal estate on trusts for sale and conversion, and out of the moneys produced thereby and the moneys forming part of his estate to pay his funeral and testamentary expenses and his debts and legacies, and, subject thereto, to "hold and apply the said moneys upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of the said premises hereinbefore devised in settlement under the Settled Land Act, 1882."

The testator died on December 1, 1895, leaving only four children, all daughters, namely, Ethel Nicola Walker, Gladys

Barbara Walker, Ruby Margaret Walker, and Winifred Sarah Walker, an infant.

All of them, except Winifred Sarah Walker, had attained the age of twenty-one years, and Ruby Margaret Walker died in 1905, unmarried and intestate, and without having executed any disentailing deed, and her administratrix was Ethel Nicola Walker. The testator's widow, who was the mother of the four children, was still alive.

One of the trustees of the will took out an originating summons for the determination of the following questions:—(1.) Whether the direction as to the residuary personal estate was a valid and effectual gift thereof in favour of the four children, or whether the residuary personalty was undisposed of by the will; (2.) if the direction was an effectual gift, whether Ruby Margaret Walker, having attained the age of twenty-one years, became entitled to one-fourth of the residuary personal estate, and, if so, whether absolutely or for an estate tail; and (3.) whether on the death of Ruby Margaret Walker, without having barred the estate tail, her share passed under the will to the surviving sisters.

The widow (as one of the next of kin of Ruby Margaret Walker), Ethel Nicola Walker (as her administratrix), and Gladys Barbara Walker and Winifred Sarah Walker were the defendants to the summons.

H. M. Humphry, for the plaintiff.

Baden Fuller, for the widow of the testator.

C. W. Turner, for the administratrix of Ruby Margaret Walker.

Harman, for Gladys Barbara Walker and Winifred Sarah Walker.

PARKER J. held that the direction as to the residuary personal estate was not void for uncertainty, but was an effectual gift of it in favour of the four daughters, and that, on the construction of the will, the residuary personal estate was to be held and applied by the trustees upon the trusts and in the same manner upon and in which the same would be held and applicable if such residuary personal estate had arisen from a sale, under the Settled Land Acts, of the freehold estates devised by the will.

PARKER J.
1908
WALKER, *In re.* MACINTOSH-WALKER *v.* WALKER.

H. M. Humphry, for the plaintiff. The next question is whether the direction in the will that the personalty is to be held as capital money arising under the Settled Land Act, 1882, is sufficient to convert it into real estate for all purposes, so that the share of Ruby Margaret Walker, who died without executing a disentailing deed, devolves under the settlement as land. A doubt whether such a direction would operate as an equitable conversion into land is expressed in Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. pp. 371, 372, and Key and Elphinstone's Precedents in Conveyancing, 8th ed. vol. ii. pp. 581, 582. [He also referred to the Settled Land Act, 1882, s. 21; s. 22, sub-ss. 2, 5, 6; s. 24, sub-ss. 1—3. (1)]

(1) 45 & 46 Vict. c. 38, s. 21: "Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes, namely:

"(i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on" certain securities of railway companies, "with power to vary the investment into or for any other such securities:

"(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

"(iii.) In payment for any improvement authorized by this Act:

"(iv.) In payment for equality of exchange or partition of settled land:

"(v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

"(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

"(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in

Baden Fuller, for the widow. The direction has not effected a conversion, and the result is that trusts which would give an

respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

"(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

"(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge:

"(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act:

"(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder."

Sect. 22: "(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees."

"(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

"(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement."

Sect. 24: "(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

"(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

"(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to

PARKER J. absolute interest in personalty give an absolute interest in this money. The application of capital trust money is regulated by s. 22 of the Settled Land Act, 1882. Sub-s. 1 of that section does not read into the will an imperative direction that the money is to be invested in land. It only gives the tenant for life an option to take it as realty, and there is no conversion till the option is exercised. Under this will the money might have arisen from realty or copyholds or leaseholds, for all three are devised, and by s. 22, sub-s. 5, it is to devolve in the same way as the property from which it arose. The testator has shewn no intention that the personalty should be converted, so on his death it became absolutely vested in his daughters as tenants in common in tail; and it was not in the power of any one to say that it must be invested in land so as to alter the devolution: *Rich* v. *Whitfield*. (1) Sub-s. 5 of s. 22 of the Settled Land Act, 1882, is only supplementary to the general principle that where land is sold the proceeds are liable to be reinvested in land: *In re Duke of Marlborough's Settlement*. (2) To effect conversion there must be an imperative direction to invest in land.

1908

WALKER, *In re.* MACINTOSH-WALKER *v.* WALKER.

C. W. Turner, for the administratrix of the deceased daughter, supported the same contention.

Harman, for Gladys Barbara Walker and Winifred Sarah Walker. There is a primary trust to invest in land. Capital money means capital money arising under the Act: s. 2, sub-s. 9; and s. 21 says how it may be applied, i.e., in the purchase of land, or redeeming mortgages on land, or improving land. By s. 21 (ix.) it may be paid to any person absolutely entitled. There is no one who can be absolutely entitled to this money without executing a disentailing deed; therefore it devolves as land. It is really a question of construction of the will. What was

---

powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go."

(1) (1866) L. R. 2 Eq. 583.

(2) (1886) 32 Ch. D. 1, 11, 13.

the intention of the testator? He has said that the money is to be treated as capital money arising under the Act, and that is enough to effect a conversion. Such a hypothetical provision is quite common; e.g., a proviso that if a devisee should die in the testator's lifetime leaving issue the devise is to take effect as if he had survived the testator and died immediately afterwards. The gift in the case might, if necessary, be held good as an executory trust. [He also referred to Davidson's Conveyancing, 3rd ed. vol. iii. p. 560, and *Attwell* v. *Attwell.* (1)]

Baden Fuller, in reply. The will neither contains an express trust for conversion nor implies a trust for conversion by reference. A direction in a statute that money shall be regarded as land may be sufficient to effect conversion, but a similar direction in a will is not sufficient. In the latter case an imperative trust is required. A mere gift of personalty by will, with limitations appropriate only to real estate, does not justify an implied trust for conversion into realty: *Evans* v. *Ball.* (2) In the absence of a direct trust there is no equity to have money which has not been invested in land treated as land: *Walker* v. *Denne.* (3) [He also referred to *In re Grange.* (4)]

July 7. PARKER J. In this case I have already held that the testator's residuary personal estate is, according to the true construction of his will, to be held and applied by the trustees upon the trusts and in the manner upon and in which the same would be held and applicable if such personal estate had arisen from a sale, under the Settled Land Acts, of the freehold hereditaments by his will devised in strict settlement. The proceeds of the sale of these freeholds under the power of sale contained in the Settled Land Act, 1882, would be held and applicable, in effect, as follows. By virtue of ss. 21, 22, and 24 they would have to be invested or applied wholly in one, or partly in one and partly in another or others, of the modes therein specified. These modes include investments in manner authorized by the settlement or by law for the investment of trust moneys under the settlement; discharge or redemption of incumbrances on the

(1) (1871) L. R. 13 Eq. 23.
(2) (1882) 30 W. R. 899.
(3) (1793) 2 Ves. Jun. 170.
(4) [1907] 1 Ch. 313.

PARKER J.
1908
WALKER, *In re.* MACINTOSH-WALKER *v.* WALKER.

settled land; payments for authorized improvements on the settled land; and the purchase of freehold, copyhold, or leasehold land, to be conveyed, as to the freeholds to the uses of the settlement, and as to copyholds or leaseholds to trustees upon trusts corresponding to such uses, or as nearly corresponding to such uses, as the law and the circumstances of the case will admit, but so that leaseholds are not to vest in any tenant in tail by purchase who dies under the age of twenty-one years. The mode of the investment or application is to be at the direction of the tenant for life, or, by virtue of a later section of the Act, the person having the powers of a tenant for life, or in default of such a direction at the discretion of the trustees; but until the proceeds are applied under the Act, as distinguished from being invested under the Act, such proceeds and the investments thereof are to devolve in the same manner, and go to the same persons respectively, and for the same estates and interests, as the land from the sale of which they have arisen, and similarly the income of the investments is to go in the same manner as the income of the land would have gone if it had not been sold. It is to be observed, however, that if once the proceeds of sale of freeholds are invested in the purchase of leaseholds, they remain personalty until the leaseholds are sold and the proceeds are again invested in realty.

Now, of course, the Legislature can, by a simple enactment to that effect, make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty; but the only manner in which an individual can do this is by the creation of an imperative trust for its conversion into realty, and for the settlement of such realty to uses which will secure the devolution or create the estates which he desires to create. A mere declaration that personalty shall devolve or pass to persons successively as realty is in itself inoperative, for the whole doctrine of conversion turns on the maxim that Equity considers to have been done what ought to have been done pursuant to the trust; and a mere declaration such as I have mentioned creates no obligation as to dealing with the property in one way or another. It is true that such a declaration, in cases where the construction of an instrument is doubtful, may help the

Court to construe the instrument as creating an imperative trust for conversion, and this, I think, is more especially the case where the express limitations contained in the instrument are limitations appropriate only to real estate; but, except on the question of construction, such a declaration as that to which I am referring is, I think, according to the decisions, absolutely nugatory.

The question, therefore, in the present case is whether the testator has by his will created an imperative trust for the conversion of his personal estate into realty, or whether he has merely attempted to do what, as I have said before, he cannot do, namely, make his personalty devolve or pass for the same estates and interests as if it were realty without creating any such imperative trust. Suppose a testator bequeaths money to trustees upon trust, at the option of another, or at their own discretion, to purchase either freeholds or leaseholds, and directs that, if freeholds be purchased, such freeholds shall be conveyed to uses by way of strict settlement, and that, if leaseholds be purchased, the leaseholds are to be conveyed to the trustees upon trusts which shall correspond as nearly as the law permits with the uses which he has before mentioned with respect to the freeholds, if freeholds are purchased; in such a case it seems to me that there would be no imperative trust for conversion of the money into real estate. In such a case would it make any real difference if the testator directed that until the application of the money in the purchase of either freeholds or leaseholds, as the case might be, the money was to devolve as the purchased freeholds would have devolved had they been purchased under the trust? It might possibly do so if the purchase of the leaseholds could be looked upon as a mere interim investment, so that the leaseholds would in equity be subject again to a trust for sale, the proceeds thereof being applicable in the purchase of freehold land settled to the uses limited with regard to freeholds; but in the case I am supposing, having regard to the express settlement of the leaseholds, if purchased, upon trusts applicable to personalty, and without the overriding trust for sale which I have suggested, I think this could hardly be done. In my opinion, therefore, such a declaration would not be operative to effect a conversion.

The only material difference between such a case and the

PARKER J. 1908 WALKER, *In re.* MACINTOSH-WALKER *v.* WALKER.

present is that the trusts declared in the present instance are declared by reference to the Settled Land Act, and that the proceeds of sale, under the Settled Land Act, of settled freeholds are, until applied, as distinguished from invested, under the Act, by the express words of the Act made to devolve and be subject to the same estates and interests as the freeholds which have been sold. But for these express provisions the proceeds would not, in my opinion, have devolved or been subject to the same estates or interests as the freeholds which have been sold, because of the absence of an imperative trust for reinvestment in freehold land.

I think, therefore, that in the present case the personal estate is not converted, but remains personalty unless and until it be invested in freehold land, or, I should rather say, in realty. It appears to me that the testator, misled, no doubt, by the ease with which the Legislature can effect the object it has in view, has attempted to effect by declaration what he could only according to law effect by an imperative trust for conversion ; and there being no such imperative trust for conversion, his attempt, I think, fails.

The effect of this is that, in the events that have happened, this personal estate, which was never invested in land under the Settled Land Act or otherwise, retains its character as personal estate, and, being given by the will in effect upon trust, in the events which have happened, for four tenants in tail, is vested in those four tenants in tail absolutely, and the legal personal representative of one of them is entitled to her share in the fund, notwithstanding that she has died without executing any disentailing assurance.

I have not to consider at present the question of a person dying under twenty-one ; I have not to consider the effect of the declaration that leaseholds, if purchased, shall not vest in a child who dies under twenty-one. That being the case, I leave that point open in case it happens. I will say that, according to the true construction of the will, the deceased daughter took a vested interest in one-fourth, and that the one-fourth is payable to her legal personal representative.

Solicitors for all parties : *Gribble, Oddie, Sinclair & Johnson.*

F. E.

REY *v.* LECOUTURIER.

C. A. 1907 Dec. 9, 10, 1

[1905 R. 1002.]

Trade Mark—Passing off—Secondary Meaning of Name—"Chartreuse"—French Law of Associations—Vesting of French Business under French Judgment—Effect of Law upon Property in English Trade Marks—Rectification of Register.

Prior to the year 1901 a body of Carthusian monks, living at the monastery of the Grande Chartreuse in France, had for many years carried on there the business of manufacturing by a secret process, and of selling, a liqueur known as "Chartreuse." In 1876 the monks, who did not carry on business in England, but whose liqueurs had acquired a great reputation here, registered in England as a trade mark a label containing the words "Liqueur fabriquée à la Grande Chartreuse," together with the device of the order and the signature of its then procureur. By a French statute, called the Law of Associations, passed in 1901, as interpreted by a French Court in 1903, the property of the monks, including their trade marks, passed to a liquidator and ultimately became vested in the defendants; but the question of the property in the English and other foreign trade marks was not decided in the judgment. The monks, having been expelled from France, set up an establishment at Tarragona, in Spain, where they manufactured the same liqueur by the same secret process, and sold it as Chartreuse through the agency of a Spanish company. The liquidator and his assignees, who were the defendants to this action, manufactured at the Grande Chartreuse, but not by the secret process, of which they were ignorant, a liqueur which they called Chartreuse, and sold it in divers countries, including England, in bottles of the old shape and bearing the old labels used by the monks. Upon application by the defendants in 1904, the comptroller placed the name of the liquidator upon the English register of trade marks in place of that of the procureur of the monks. An action was brought by the representative of the order of monks and others to restrain the liquidator and his agents from using the word "Chartreuse" in connection with the liqueur made by them, and from passing off their liqueur as that of the plaintiffs; there was also a motion to expunge the name of the liquidator's representative from the register:—

Held (reversing the judgment of Joyce J.), that the word "Chartreuse" had acquired in England the secondary meaning of a liqueur made by the monks of the Grande Chartreuse; that under the French judgments the defendants had not acquired the right of selling their own liqueur in England under the original labels and marks; that the English trade marks had not passed to the liquidator and through him to the defendants;

C. A.
1907
REY
v.
LECOUTURIER.

that the defendants were passing off their own liqueur under the name "Chartreuse" as being the original liqueur made by the monks, and that the plaintiffs were entitled to an injunction to restrain the defendants from using the word "Chartreuse" in England in connection with the sale of liqueur other than that made by the plaintiffs as the name of or as descriptive of the liqueur or without clearly distinguishing their own liqueur from that of the plaintiffs.

Held, also, that the name of the liquidator's representative must be expunged from the register of trade marks.

APPEAL of the plaintiffs from a judgment of Joyce J. in an action to restrain the defendants from using the word "Chartreuse" as descriptive of a liqueur made by them and from passing off their liqueur as that of the plaintiffs, and upon a motion for rectification of the register of trade marks. The material facts were as follows.

The plaintiffs were the representatives of the Carthusian order of monks, a religious body founded in the eleventh century, whose principal house had for some centuries been the monastery of La Grande Chartreuse near Grenoble, in France. The monks had been expelled from France in 1793, but returned in 1816, although the French Penal Code of 1810 forbade the association without the consent of the State of more than twenty persons; they were permitted to remain in France, and in 1857 were so far recognized by the State that they obtained authority over the forests surrounding the monastery of La Grande Chartreuse. Upon their return in 1816 the monks had commenced to manufacture liqueurs from a recipe which had long been in the possession of their order, and which contained ingredients and were manufactured by a process that were kept secret from all but a limited number of members of their own body. About the year 1850 the business of the manufacture and sale of this liqueur was placed upon a commercial basis, the manufacture being carried on principally at Fourvoirie, about five miles from the monastery.

In course of time the liqueur so manufactured by the monks came to be known as Chartreuse, and in 1852 certain labels, bearing the words "Grande Chartreuse" or "fabriquée à la Grande Chartreuse," with an orb and cross surrounded by seven stars and the signature of Louis Garnier, the then procureur-

général of the order, were registered in France by Louis Garnier as trade marks, and subsequently the bottles and labels used by the monks until the present time were also registered in that country. The bottles were of a special shape and were engraved with the words "Grande Chartreuse" and the insignia of the order. In 1871 Garnier assigned his property in the trade marks and labels and in the business of manufacturing liqueurs to Gabriel A. Grézier, who became procureur of the order, and in 1876 Grézier registered the trade marks and labels in England in class 3 for medicinal liquors and in class 43 for liqueurs. In 1897 Grézier assigned the trade marks and property both in England and France to Célestin Marius Rey, the then procureur of the order and the original plaintiff in the present action. This last assignment purported to be made for valuable consideration (about four and a half millions of francs), upon which stamp duty was paid. In January, 1898, C. M. Rey was registered in England as the proprietor of the trade marks, and his name continued on the register until May, 1905, when, in consequence of events that had happened in France, the name of the defendant Lecouturier was substituted for it.

The liqueurs manufactured by the monks and sold in England were sold as, and were commonly known as, "Chartreuse," and in legal proceedings in several countries, including England, the use of the word had been held to mean a liqueur manufactured by the monks at La Grande Chartreuse. It was claimed that the recipe and the process of manufacture were secrets known only to certain members of the community to whom they were from time to time entrusted. The profits made in the manufacture and sale were devoted to the benefit of the order.

In 1901 there was passed in France a law called the Law of Associations, which enacted (inter alia) that where a religious association failed to obtain the authorization of the Minister of the Interior for its continued existence, its dissolution should be decreed by the civil tribunal and its property should pass to and be administered by a judicial liquidator under the supervision of the Court. Authorization having been refused to the community of La Grande Chartreuse, their body was declared to be dissolved, and on March 31, 1903, the defendant Lecouturier was

C. A. 1907 REY v. LECOUTURIER.

appointed judicial liquidator of their property; in the following month the monks were expelled from France and established themselves in monasteries in Italy and Spain. Subsequently, in July, 1904, the monks entered into an agreement with La Union Agricola, a company formed in Spain under Spanish law, who were joined as plaintiffs in the present action, by which certain of the monks were to manufacture their liqueurs at the Spanish town of Tarragona, and the company was to have the monopoly of the sale of these liqueurs for twelve years.

An action had meanwhile been brought in the French Courts by Lecouturier as judicial liquidator against Rey and others, in which it was decided that the congregation of monks, and not Rey personally, was the owner of the business, and that the business with the goodwill and the ownership of the trade marks passed to the liquidator; this judgment was affirmed on appeal by the Cour de Cassation. No decision was, however, ever given by the French Courts upon the question whether this judgment included the trade marks in foreign countries outside France.

In May, 1905, Lecouturier applied in England to have his name entered in the register as owner of the trade marks registered in this country, and upon evidence of the legal proceedings in France the Comptroller-General substituted the name of Lecouturier in the register for that of Rey. In 1906 Lecouturier assigned his interest in the business, goodwill, and trade to his co-defendants in this action, the Compagnie Fermière de la Grande Chartreuse, who manufactured liqueurs in the old distillery of the Carthusian monks at Fourvoirie, and sold them under the old names, in the old bottles, and with the old labels, which only differed in the fact that they bore another printer's name; they bore the signature of L. Garnier and the words "fabriquée à la Grande Chartreuse." The defendants also issued an advertisement in the following terms:—"The genuine liqueur, manufactured solely at La Grande Chartreuse in France. In consequence of events not thoroughly understood by the public an increase of imitations has appeared. Therefore the necessity arises to put consumers on their guard, and remind them that 'Chartreuse'—the incomparable liqueur—is made, and can only be made, at La Grande Chartreuse. Caution.—When asking for

'Chartreuse' insist upon seeing the well-known signature and emblem on the label, which alone ensure you obtaining the old and world-renowned liqueur 'Chartreuse.'"

The present action was commenced by Célestin Marius Rey (who died after action brought) and others on behalf of the members of the Carthusian order and by the Union Agricola against Lecouturier, the Compagnie Fermière, and their agents in England, and the plaintiffs claimed an injunction to restrain the defendants, their servants and agents, from using the word "Chartreuse" in connection with the sale of liqueurs other than those manufactured by the plaintiffs, and from selling or offering for sale in this country any liqueur or other liquor not so manufactured in such a manner as to represent or lead to the belief that the liqueur or other liquors manufactured or imported or sold by the defendants were the manufacture of the plaintiffs. Damages were claimed. At the same time there was heard a motion by Albert Rey, who was the administrator of the estate of Célestin Marius Rey, for an order under s. 90 of the Patents, Designs and Trade Marks Act, 1883, directing the comptroller to expunge the entries in the trade marks register so far as the entries purported to represent that the trade marks were the property of Lecouturier. The motion was heard with the action.

P. O. Lawrence, K.C., *Younger*, K.C., and *Sargant*, for the plaintiffs.

Sir R. B. Finlay, K.C., *Hughes*, K.C., and *Sebastian*, for the defendants.

Sir J. Lawson Walton, A.-G., and *George Lawrence*, for the Comptroller-General.

JOYCE J. held that under the French judgments the liquidator became entitled to the business of the monks carried on at the Grande Chartreuse, with the goodwill, trade marks, &c., including the English trade marks, and that he was entitled to hold himself out as carrying on every part of the whole business; that the signification of the word "Chartreuse" was primarily local, and that the plaintiffs were not entitled to use the word or to sell liqueur under that title without sufficiently distinguishing

C. A. 1907 REY v. LECOUTURIER.

it from the product of the defendants now manufactured at the Grande Chartreuse; and he dismissed the action and refused the motion to expunge the entry in the register.

The plaintiffs appealed. The appeal came on for hearing on December 9, 1907.

P. O. Lawrence, K.C., Younger, K.C., and *Sargant*, for the plaintiffs. The meaning of the word "Chartreuse" is not confined to a particular locality or to the product of a particular district; if it were so limited, any one could manufacture a liqueur by any process and from any ingredients and call it Chartreuse. Even assuming that the word had originally a local signification, it has by long user acquired in the English market the secondary meaning of liqueurs made by the monks by their particular or secret process; this is the clear view of Chitty J. in *Grezier & Doyle* v. *Autran*. (1) The monks are still making the same liqueur by the same process, and the fact that they have transferred their place of manufacture from the Grande Chartreuse to Tarragona makes no difference to their right to use the name "Chartreuse" themselves and to prevent others from using it in this country: *Wotherspoon* v. *Currie*. (2) The defendants are not making the same liqueur as that of the plaintiffs, for they have been unable to discover the secret process or ingredient; they are passing off their own liqueur for that of the plaintiffs, and are inducing purchasers to believe that what they are selling is what was known as Chartreuse when the plaintiffs used to make it in France. The defendants are selling a sham article under a name adopted in order to deceive, which is a fraud at common law, and an injunction will be granted against its continuance: *Cotton* v. *Gillard* (3), a case very similar in this respect to the present one; *Reddaway* v. *Banham*. (4) This is clearly the law in this country, and the case is governed by English law: *Pinto* v. *Badman*. (5) Although the monks did not carry on business in England, the fact that their goods were largely imported into this country and had

(1) (1895) 13 Rep. Pat. Cas. 1.
(2) (1872) L. R. 5 H. L. 508.
(3) (1874) 44 L. J. (Ch.) 90.
(4) [1896] A. C. 199.
(5) (1891) 8 Rep. Pat. Cas. 181.

acquired a high reputation here gave them a right to protect their trade name in England: *Collins Co.* v. *Brown* (1); *Panhard et Levassor* (*Société Anonyme*) v. *Panhard Levassor Motor Co.* (2) The French judgments operated on the plaintiffs' property in France only; they did not transfer, nor did they purport to transfer, to the liquidator the right to property outside France; the liquidator is therefore not entitled to the English trade marks. Even if the French Courts had assumed to transfer the English trade marks to the liquidator, such a judgment would have been penal and would not be enforced in this country. Both in the United States and in Germany the Courts have held that the French judgments did not affect the plaintiffs' rights in those countries. It is true that the plaintiffs have been compelled to use a new label since Lecouturier's name was placed on the register, for they could not have got their goods into this country under the old label; but this compulsory cessation of user of the old label cannot affect the plaintiffs' legal rights. [They also cited *In re Magnolia Metal Co.'s Trade Marks.* (3)]

Sir R. B. Finlay, K.C., Hughes, K.C., and *Sebastian,* for the defendants. The judgment of Joyce J. was right. The business was carried on in France by the monks, who were French subjects with a French domicil and amenable to French law. Apart from their French business the monks had no business and no goodwill in England or elsewhere; their trade marks were accessory to their French business, and therefore the benefit of their English trade marks, though they were not the subject of a definite decision in the French Courts, passed under the French judgment, which was the decision of a competent tribunal, to the liquidator. There has now been a complete vesting of the business in the purchaser from the liquidator under a judicial sale. The unquestioned fact that the liquidator or his assignee has the right to use the French labels in France carries with it the property in the trade marks in other countries. No English right of property in the trade marks is acquired from the fact that they are on the English register; they cannot exist apart from the French business, and the right

(1) (1857) 3 K. & J. 423. (2) [1901] 2 Ch. 513.
(3) [1897] 2 Ch. 371.

C. A. 1907 REY v. LECOUTURIER.

of the property in them is a right of the French company in France, not a separate local right in England. There was by the French judgment a complete and binding transfer of the whole of the plaintiffs' property which all Courts are bound to recognize. The fact that the monks still retain their secret process cannot alter the legal effect of the transfer of the business. Assuming that the liqueur made by the defendants is not precisely similar to that made by the plaintiffs in France, a mere variation in the mode of manufacture is not fraudulent. It is not an essential part of the meaning of the word "Chartreuse" that the liqueur should be manufactured by the Carthusian monks, for they could at any time sell their business to a purchaser; it means a liqueur manufactured in the course of a business carried on at the Grande Chartreuse, that is to say the liqueur now made there and sold by the defendants. The defendants have not passed off their goods as the goods of the plaintiffs, nor are they representing themselves as making the same liqueur as that now made in the business carried on by the plaintiffs at Tarragona. [They cited *De Beers Consolidated Mines, Ld.* v. *Howe*. (1)]

P. O. Lawrence, K.C., was not called upon to reply.

1907. Dec. 11. LORD ALVERSTONE C.J. I am unable to agree with the conclusion arrived at by Joyce J. in the Court below. The action of the comptroller in refusing to expunge the last entry has only been supported upon the same grounds as the general decision upon the case; I need say no more about it than that it is a consequence of the judgment which I am about to deliver that the last entry—that which purports to treat the British trade marks as having been assigned to Lecouturier—must be taken off the register. This will leave open the question whether the monks themselves, or those who represent their liqueur as being manufactured at Tarragona, can be restrained from making use of the labels. On this part of the case our judgment will be to expunge that entry only.

I now come to the substantial question in this appeal, which may be stated thus: Had the trade marks, and in particular the word "Chartreuse," in the year 1901 or 1903 acquired in the

(1) [1906] A. C. 455.

liqueur market in England a secondary meaning, and, if so, who was entitled to the benefit in England of the protection afforded by that secondary meaning? Further, have the proceedings in France deprived of the right to that benefit the persons who would otherwise be entitled to it? I have listened carefully to the criticism of the evidence by the respondents' counsel, and I have not the shadow of a doubt that for a great many years before 1901 the expression "Chartreuse" or "Grande Chartreuse" had acquired in England in the liqueur market the secondary meaning of a liqueur manufactured by the monks of the monastery. Whether the monastery included the distillery or outlying buildings, and whether the final product was in fact bottled at the monastery or at the distillery, is to my mind wholly immaterial; what anybody would have understood the expression to mean would have been the liqueur manufactured by the monks of the monastery of La Grande Chartreuse. There was practically no dispute as to that. I may cite two passages in the evidence given for the defendants; they are as follows: "Prior to 1903, when the monks left Chartreuse, was it well understood in this country that the Chartreuse which was sold was made by the monks?—Yes. Would it, in your opinion, be a matter of importance to any one now selling Chartreuse to represent that it was being made by the monks?—I do not think so. Had not their reputation of Chartreuse before 1903 been made exclusively by the reputation it made when sold here?—Yes. And was it not known throughout this country to have been made by the monks?—Yes. Was it not a valuable reputation?—Yes. A very valuable reputation?—Yes. And it was known and sold as Chartreuse, pure and simple, was it not?—It was." I do not think there could be a clearer admission from a hostile witness that the secondary meaning to which I have referred was recognized in the market. Then there is the following short passage in the evidence of Mr. Willis: "Have you any experience of the sale in England of this liqueur of Chartreuse?—Yes. You have known of its sale for many years, I suppose?—Yes. And usually asked for as Chartreuse?—Yes. And known to have been the manufacture of the monks?—Yes. And in your opinion known generally as the manufacture of the monks?—Yes."

C. A. 1907 REY v. LECOUTURIER. Lord Alverstone C.J.

If this had been the first time that this question had been investigated, that evidence would abundantly support the view which I have formed, but we cannot decide this case on the assumption that the question is now raised for the first time. In one sense of course the evidence given before Chitty J. in *Grezier & Doyle* v. *Autran* (1) is not before us, but we are entitled to see what was established in 1896, seven years before this question arose. In his judgment Chitty J. says: "The evidence as to the liqueur is entirely in favour of the plaintiffs, and is practically uncontradicted. The plaintiff Doyle is merely the agent in this country for his co-plaintiff; Grezier is the substantial plaintiff. He is the procurator of the monastery, which was founded in France in the eleventh century. The monks have from a very early period made liqueurs at the monastery. The materials used in and the processes of making the liqueurs and the elixir are secrets which at present belong to the plaintiff Grezier, and are confided to three other members of the monastery only, who are employed by Grezier and are bound to secrecy." I do not think that this secret can be dismissed with a wave of the hand, as was attempted by the respondents' counsel. The evidence of gentlemen who swore that until the dissolution of the monastery each man was allowed to know only one-fourth part of the secret, with the exception of the head of the order and of Mr. Baume, who said that the four parts were only confided to him when he went to superintend the manufacture at Tarragona, is not evidence that can possibly be disregarded, and it is evidence of the same character as that given before Chitty J. The learned judge continues: "The liqueur, until about the year 1850, was sold only in the towns in the neighbourhood of the monastery. Since then, the manufacture and sale of the liqueur have been continuously growing, and are now very considerable. Since 1840, or thereabouts, it has been the continuous custom to attach labels to the bottles containing the liqueur made at the monastery, the colours of the labels being green, yellow, or white, according to the colour of the liqueur, and bearing the words or inscription 'Liqueur fabriquée à la Grande Chartreuse' (the words 'liqueur' and 'grande' being sometimes abbreviated), or

(1) 13 Rep. Pat. Cas. 1, 6.

simply 'Grande Chartreuse,' and a facsimile of the signature of L. Garnier. Since 1869, all the liqueurs have been put in bottles of a description then devised, ... which formerly had embossed but now have engraved upon them the words 'Gde Chartreuse.' Since 1850 the liqueurs of the monastery, particularly the green and the yellow, have become well known in this country by the names of 'Liqueur de la Grande Chartreuse' or 'Liqueur fabriquée à la Grande Chartreuse,' and by the abbreviated names of 'Chartreuse' and 'Grande Chartreuse,' but more especially as 'Chartreuse.' These names are now of great commercial value." When that is the state of facts recognized by Chitty J. in his judgment, it is not going too far to say that, unless the evidence in this case puts it upon an entirely different platform, it negatives the idea that "Chartreuse" means nothing but a liqueur made in a particular district. It is suggested that Chitty J. found that that was the meaning of the word. In my opinion he did not so find, but, whether there is such a district or not, Chitty J. undoubtedly referred to the marks as confined to the liqueur manufactured by the monks: he says, in plain words, "any person ordering Chartreuse intends and expects to be supplied with liqueur made at the monastery." I am not at liberty to disregard that finding. Even if I interpret the passage as to "Chartreuse" or the monastery as meaning the geographical locality in which the liqueur is made, it is quite plain, on reading the injunction which Chitty J. granted, that he treated the name Chartreuse as describing the liqueur which was made by the monks, and nothing else.

To come to the history of the trade marks, which is only important in order to see whether it puts any different construction on these words. There have been trade marks on the register from the year 1876. I will call attention to three of them. First, there is the green label "Liqueur fabriquée à la Grande Chartreuse," "L. Garnier" with the orb, and "Louis Garnier" with the orb on the other side. In addition to the label, there is something quite independent of it which has made a great impression upon me; that is the bottle, within the glass-work of which are indelibly fixed the words "Grande Chartreuse" with the seven stars and the orb, which were also registered

C. A. 1907 REY v. LECOUTURIER. Lord Alverstone C.J.

trade marks. Labels may of course come off or be covered by other labels, but the mark in the glass will last as long as the bottle itself and will naturally tend to become the name by which the liqueur would be known. This use of the trade mark is, in my opinion, the strongest corroboration of the view which was taken, I think rightly, by Chitty J., that the name "Chartreuse" or "Grande Chartreuse" had come to be regarded as the name of the liqueur. I am told that the same conclusion has been arrived at by many Chancery judges; but, however that may be, the correctness of the decision of Chitty J. is not impugned. The position therefore is that for many years there has been litigation of this question in England, and it has been recognized that in this country the name has attached exclusively to the liqueur manufactured by the persons who possess this particular recipe. The same thing has taken place in America; there has been litigation in that country with respect to persons who have sought to use or imitate the name. If, therefore, the question in the present case is to be decided without regard to the effect of the French judgments, there could be no question whatever as to our decision. To test this question, let us suppose that the monks had moved their manufacture to another monastery or another building in France and had sold the fabric of the distillery and left the district of La Grande Chartreuse, but had continued to make the liqueur in the same way; could it be contended that any one who bought as old bricks and mortar the distillery at Fourvoirie could immediately call any liqueur made there by the name of Chartreuse, and put it on the English market under that name? It is to me quite unarguable.

Then what is the effect of the French judgments? For the purpose of my decision I recognize that the French Courts have decided that the goodwill of the business carried on in France passed to the liquidator, that is, to the State. I do not speculate as to how the French Courts would decide some of the questions mooted before us, were they to arise in that country. I am not satisfied that the French Courts have decided more than this: that the property there did not belong to Rey personally, but to the monks, and that whatever belonged to the monks in France passed to the liquidator. But that does not by any means shew

what, in the event of litigation, the French Courts would hold to be the rights of those who are endeavouring to sell the genuine liqueur in France. What is the effect of this registration, and of the use by the Compagnie Fermière, the assignees of Lecouturier, of the word "Chartreuse"? Upon the evidence it cannot be seriously disputed that by the use of the word "Chartreuse" and of the old labels the Compagnie Fermière are endeavouring to get for their new manufacture the benefit in England of the old trade mark which had been attached to the old manufacture and of the reputation attached to the old trade labels. No particular importance attaches to the fact that they have put in the words "Lith. Grenoble," except that it shews the extent to which it was thought desirable to imitate the exactness of the old label. Of course, in a sense, the expression "fabriquée à la Grande Chartreuse" was not an accurate expression as applied to the actual manufacture which was carried on at the distillery; but no distinction seems to have ever been drawn between the distillery and the monastery. But when once we get the facts that this label, so well known on the market, was attached to the liqueur manufactured by the defendants, that that liqueur had in consequence come to be known as Chartreuse, and that the bottles in which it was contained were stamped with the name "Chartreuse," it follows that such a use of the name would inevitably give to the product of the defendants' manufacture a reputation and position to which it had no right, unless the mere fact that that liqueur was produced within the four walls of the monastery or within the particular district of the Grande Chartreuse gives a right to the use of the name, or unless the purchase from the liquidator gives that right. The only answer given to my question as to why the defendants put their liqueur into bottles of the particular shape used by the monks was the answer that the defendants had bought the bottle; but the purchase of the bottle in France could not affect its use in England. I am driven, therefore, to the conclusion that the use of a bottle of that shape was adopted in England by the defendants because it is part of the reputation of the article, and that the defendants considered it absolutely necessary to retain the shape of the bottle, and to have upon it

C. A. 1907 REY v. LECOUTURIER. Lord Alverstone C.J.

the words "La Grande Chartreuse" and also the seven stars which had been for about half a century used in connection with it. I cannot help thinking that, if genuine competition had been the only end they had in view, the Compagnie Fermière would not have abandoned the use of their own name of "liqueur jaune," which is alleged to be a superior product, and would have avoided the use of a name which so exactly represents the old product. What is the effect upon the defendants' rights of their registration of these trade marks? The effect of their being on the register in respect of a particular bottle—say the bottle bearing the name La Grande Chartreuse with the seven stars—is that no one else could use that bottle in England; it would be stopped at the Custom House unless it were coming over for the defendants.

There is another matter which has been the subject of discussion. It ought to be impossible for the defendants to put out such an advertisement as they have done in this case, the only possible justification for which is the presence upon the register of the trade marks in the name of Lecouturier. Unless they became possessed of the trade mark rights which the monks undoubtedly possessed before them, they could not have used such a label as this: "Chartreuse, the genuine liqueur manufactured solely at La Grande Chartreuse in France. In consequence of events not thoroughly understood by the public an increase of imitations has appeared. Therefore the necessity arises to put consumers on their guard and remind them that Chartreuse—the incomparable liqueur—is made, and can only be made, at La Grande Chartreuse," which is as audacious a falsehood as could well be conceived. Then again it says, "When asking for Chartreuse, insist upon seeing the well-known signature and emblem upon the label"—not Cusenier, not "liqueur jaune," but the orb and "Louis Garnier"—"which alone ensure you obtaining the old and world-renowned liqueur Chartreuse." The arm of the law ought to be strong enough to prevent the use of such an advertisement with a view of pushing the sale of products not made from the old recipe and not requiring, if they are good in themselves, the aid of such misstatements. Such an advertisement could only be issued as

long as the name of Lecouturier was upon the register, and the Compagnie Fermière had the benefit of the registration. And even when the defendants used the old label they added the misleading words, "Shipped to the United Kingdom direct from the monastery. None is guaranteed genuine in the United Kingdom unless bearing the label of which this notice forms a part." I do not understand what meaning could be placed upon the words "direct from the monastery," unless they meant, and led people to believe, that the liqueur contained in the bottle was still being made by the monks. Then it was suggested that in future it would be impossible for the monks themselves to use the old labels without some addition, but we have not to deal with that question in the present case. The monks did in fact add a statement that the liqueur was at the moment being made at Tarragona. Whether that is enough is not for our consideration, and I only allude to it because it may possibly be necessary for the monks to add something in the future to shew that the liqueur is actually manufactured at some other place than Fourvoirie or La Grande Chartreuse; but that fact, if indeed it be so, does not enlarge the rights of the defendants. It was suggested that the rights of the monks had been affected by their adoption of the description "Liqueur fabriquée à la Tarragona par les Frères Chartreux." But that was not done until after Lecouturier's name had been placed upon the register, and, further, it was required because they could not have imported their liqueur into this country under the labels bearing their old trade mark. When this case is properly understood, I think that the view taken by the American Court, that the French judgment did not affect the rights of the monks in the United States, was absolutely right, and, entertaining that view, it is obvious that the ordinary protection of the law cannot be given in this country to the industry of the monks, who have been obliged to emigrate from their own country, unless the English law gives them the same protection to which they are entitled in America. Reliance was placed by the respondents upon the judgment of a French Court in Tunis, which was read to us, but it is not, in my opinion, an authority that we ought to follow in preference to the decision of the American

C. A. 1907 REY v. LECOUTURIER. Lord Alverstone C.J.

Court. (1) The actual form of the injunction in the present case will be settled by Buckley L.J.; it seems to me that it ought not to be so drawn as to prevent the Compagnie Fermière from telling the truth, but rather so as to prevent them from telling a falsehood in order to commend their wares in this country. The appeal will be allowed, and the register will be rectified by striking out the alleged assignment of these trade marks to the defendant Lecouturier.

BUCKLEY L.J. I am of the same opinion. When once the facts are appreciated the case is not difficult of decision. I will first say a few words as to the French judgments. The parties to this suit are all amenable to the law of France, and were either parties to the French litigation or derive title from those parties; we are bound to look upon the French judgment as binding upon those parties. The judgment of April 23, 1904, of the Court of first instance decided that the business of manufacturing liqueurs carried on at the Grande Chartreuse, together with the goodwill and the trade marks and the exclusive use of the name of Louis Garnier, were the property of the monks as a congregation, and not of Rey personally; the result was that when the law of 1901 came into operation all the property passed to the liquidator. That order was affirmed by the judgment of the Cour de Cassation on July 31, 1906. The dispute clearly was whether Rey, a natural person, or the congregation of monks, who were a body amenable to the legislation of 1901, was entitled to the property, and the Court affirmed that the congregation of monks was entitled, the result being that that legislation operated upon this particular property. An extract or two from the order of that Court shews this clearly. The recital says: "Whereas as well in the first instance as on appeal the argument has exclusively related to the point whether the property in the business of the Chartreuse, with all its accessories, should be preserved for the Abbé Rey by virtue of the deed of November 20, 1897, or attributed to the liquidator of the dissolved congregation." The Court took the latter view. The next passage shews what they were

(1) *Baglin* v. *Cusenier Co.*, (1907) 156 Fed. Rep. 1016: cited to the Court of Appeal from a short-hand note, no report being yet accessible.

not deciding: "At no time have the judges of fact been asked to determine the working conditions, nor to see whether the working could be carried on without leading third persons into error as to the nature and quality of the product." The French judgment was subject to these limitations: first, that the French Court was not adjudicating upon matters over which it had no jurisdiction; it was adjudicating upon this business as carried on in France, upon its goodwill, and the trade marks as there enjoyed; but that Court had no jurisdiction to determine what ought to be the entries in the register of trade marks in England, nor could its order affect the goodwill, if any, in England. The second limitation of the French judgment was this: that Court was confining itself to the decision, as between Rey and the monks, of the title to this property, and was not deciding the question whether the liquidator or the purchaser from him would in the conduct of the business purchased be leading third persons into error as to the nature or quality of the products; in other words, the Court expressly left open the question which we now have to decide. I need say no more as to the foreign judgment, which in my opinion has little or nothing to do with the present matter.

There passed under the French law to the liquidator, and through him to the other defendants, the business of the Grande Chartreuse. Thereupon the monks were entitled, according to English law, to go elsewhere and carry on the business which they had theretofore carried on in France, to make the article which they had previously made and offer it for sale, and to enjoy the benefit of such trade marks as had not been handed over by the French Court to other parties; the one thing which they were not entitled to do was to say that they were carrying on the old business which, by the operation of French law, had been handed over to the liquidator. So much for the plaintiffs. Then what were the defendants entitled to do? They were entitled to say that they were the successors to the business carried on at the Grande Chartreuse, and that they had the goodwill in France of that business; but they were not entitled to say, if it was not the truth, that they were making the same article as the monks had previously made, nor to pass off

C. A. 1907 REY v. LECOUTURIER. Buckley L.J.

goods of their own manufacture as goods made by the monks. What then happened was that the monks removed to Tarragona, and there carried on the business of making this liqueur by what the evidence shews to be a secret process; when, however, they tried to introduce their goods into England they found themselves faced by a grave difficulty. Lecouturier, the liquidator under the law of France, had got on to the English register of trade marks, and therefore the monks, in order to get their goods into England, had to give up the use of the trade mark in respect of which Lecouturier's name was on the register. Then the monks took certain steps which I need not detail at length, but they never in any way abandoned their rights. Lecouturier's name had been placed on the register on May 2, 1905; on May 20 the plaintiffs moved to expunge his name, and on May 27 they issued the writ in the present action. Their complaint is that the defendants are passing off their own goods as the plaintiffs', and I am perfectly satisfied upon the evidence that that is precisely what the defendants have been and still are doing. Having once got upon the register, the defendants were entitled to use the English trade marks, and they in fact used them; they added to them a statement, "This is shipped to the United Kingdom direct from the monastery through Mr. Garrett, of London, sole agent for the sale of the products of La Grande Chartreuse in Great Britain and Ireland and South Africa." The defendants also issued an advertisement, which the Lord Chief Justice read in his judgment and which I will not repeat: in it the defendants use with regard to the liqueur the adjectives "genuine," "incomparable," "old," and "world-renowned"; they describe their own manufacture as the genuine article. This is all calculated to lead a purchaser to believe that he is buying the article which had been upon the market for so many years. The defendants also complain of imitations of the article, and then make use of the orb and the signature, Louis Garnier, which had of course always been connected in the mind of the public with the article made by the monks. The facts convince me that the defendants were representing that they were making the article which the monks had made, and were not representing, as they had a right to do, that they

were carrying on the business which they had acquired under the French law. The monks took, as they were entitled to do, their secret with them to Tarragona, and they are carrying on from Tarragona a business in this liqueur. Of course in this country a trade mark can only be enjoyed in connection with a business, but I think that the monks are carrying on a business in connection with which they can enjoy any trade marks to which they may be entitled, and the labels which were put upon the register, and in respect of which the defendant Lecouturier has had his own name placed upon the register. Are those trade marks the property of the plaintiffs? In my opinion they clearly are. The French Court had no power to determine, as between the defendant Lecouturier and the monks, the rights of the monks in respect of the English trade marks used by them in connection with their business, and the monks were clearly entitled to keep them. The defendant Lecouturier obtained the insertion upon the register of an assignment expressed to bear date December 8, 1904, though no such assignment ever existed in fact; he obtained that insertion upon an affidavit which referred to certain of the judgments in France, but which did not shew that he had ever become entitled to the English trade marks. I think, therefore, that the motion under the Trade Marks Act must succeed; in other words, the last statement on the register that there was an assignment on December 8, 1904, must be expunged. This will of course leave it open for any one who may be entitled to be subsequently placed on the register. I think that in this action the plaintiffs are entitled to an inquiry as to damages and an injunction in this form: An injunction to restrain the defendants, their servants and agents, from using the word "Chartreuse" in connection with the sale of liqueurs other than those manufactured by the plaintiffs as the name of or as descriptive of the liqueur, or without clearly distinguishing the liqueurs so sold from the liqueurs manufactured by the plaintiffs, and an injunction to restrain the defendants, their servants and agents, from selling or offering for sale in this country any liqueur or other liquor not so manufactured in such a manner as to represent or lead to the belief that the liqueur or other liquor manufactured or imported or sold by the defendants is the

C. A. 1907

REY v. LECOUTURIER.

manufacture of the plaintiffs. The plaintiffs must have the costs of the action and of the appeal.

KENNEDY L.J. I am of the same opinion, and, as we are differing from Joyce J., I will shortly state my reasons. The action is brought to restrain the defendants from passing off goods which a buyer would suppose to be the goods of the plaintiffs; and there is superadded a claim under the Trade Marks Act to expunge from the register of trade marks an entry relating to the assignment of certain marks. The case, without going into details, strikes me in this way. The monks had in fact this settlement in the district of the Chartreuse or the Grande Chartreuse; they manufactured by a process, the secret of which was known to no one but themselves, a liquid which became famous under the name of Chartreuse; and for many years, certainly as long ago as the decision in *Grezier & Doyle* v. *Autran* (1), Chartreuse has had a hold on the public as being the manufacture of these Carthusian monks. Whether the Carthusian monks were so called from an early geographical title of the place where they resided and carried on their manufacture seems to me wholly immaterial; the result of their industry was that the article they manufactured had acquired a commercial value as "Chartreuse," which meant to the public a liqueur manufactured by the monks by their own process. It is with regard to this that—I say it with all respect—Joyce J. has taken a view which is not consistent with the evidence; he has attached an importance which I do not think ought to attach to the mere locality where the product is manufactured. Whatever the origin of the name "Chartreuse" or of the manufacture, substantially the name is used as the name of the liqueur manufactured by particular persons and by a particular process. That being so, whatever the defendant Lecouturier and his assignees obtained under the French judgment, they did not obtain that which the monks retained and still retain; they got it without the power of manufacturing Chartreuse by means of the persons who had manufactured it before, and without the process by which they had manufactured it. In my opinion it is clear

(1) 13 Rep. Pat. Cas. 1.

that there was nothing to prevent the monks from carrying their manufacture to another country, and with it the secret process which they alone had used; it is impossible for the defendants to say that by reason of the proceedings in France they acquired, by means of what I may call the artificial action of the law, the process which as a fact they have not got. The monks would not have been prevented from carrying on a business in competition, provided they did not represent that they were carrying on their business at the old place. In my opinion all that happened in the present case under the French statute was an intra-territorial transaction, which gave certain rights in France to purchasers through the defendant Lecouturier, but did not affect the rights of the owners of the trade marks in this country. The defendants have put upon the English market an article, and have used in connection with it an advertisement, which when coupled with the description advertised and engraved on the bottles was in a form which would lead a buyer mistakenly to suppose that he was still getting that which had become a known article, the merit and reputation of which came from the monks. I am unable to follow the remarks of Joyce J. on the evidence when he says, "There was nothing further from the contemplation of either party than that their Chartreuse should be passed off as the product of the other, or be purchased as or for the other." If the learned judge means by that that the defendant Lecouturier was not seeking to say that what he sold in this country had been manufactured at Tarragona, it is, of course, true; but if he means that the defendants were not contemplating that what they were putting on the English market should be bought here as being the product which had acquired the description of Chartreuse—that is to say, a product manufactured by the monks according to their secret process—then I am entirely at variance with the learned judge on the question of fact. What the defendants desired to impress upon the public was that they were getting the very thing which the Carthusian monks manufactured by their own process, although the defendants were not using the process of the monks nor selling anything manufactured by the monks; they had only bought the locality and the buildings where the

C. A. 1907 REY v. LECOUTURIER. Kennedy L.J.

monks had carried on their manufacture together with the business of the monks in France (whatever that may mean), which did not include the use of the secret process. In my opinion it is the true inference from the facts that the defendants have been making a representation that the thing which they are putting upon the market is something which in fact it is not. This is an injury of which the plaintiffs have a right to complain, for they have continued to make, though in a different place, and to sell the same article which they manufactured before, and which the defendants untruly represent to be manufactured by themselves. With regard to what took place in France, I do not think that we can say more than that the liquidator and those claiming under him are rivals in business of the plaintiffs and enjoy the advantage of Government protection in that country; but that cannot avail them in this country when once the plaintiffs, who have a right to have their trade in this country protected, prove (as they have done) that the defendants are selling something as being produced or manufactured by them which they have never been in a position to produce or manufacture.

The trade marks seem to me to follow the other part of the case. We are only being asked to expunge the last entry; whether the defendants can, under changed circumstances, avail themselves of the other entries is a different matter, with which we have at present no concern. The plaintiffs have shewn upon the face of their labels that their manufacture of Chartreuse is now being carried on at Tarragona, and we need say no more at present than that the entry of the last assignment should be expunged from the register.

Solicitors for appellants: *Hollams, Sons, Coward & Hawksley.*

Solicitors for respondents: *Steavenson & Couldwell; Solicitor to the Board of Trade; McKenna & Co.*

W. J. B.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1908, will be as follows :—

In the First Series,
[1908] 1 Ch. [1908] 2 Ch.

In the Second Series,
[1908] 1 K. B. [1908] 2 K. B. [1908] P.

In the Third Series,
[1908] A. C.

INDEX.

ACCOUNT—Bringing into—Statute-barred debt owing to estate—Residuary legatee of debtor's estate also a legatee of creditor's estate – – – – – **682**
See ADMINISTRATION. 4.

ACQUIESCENCE—Way, Right of—Highway—User by public—Dedication—Land in settlement—Possibility of dedication
See WAY, RIGHT OF. **586**

ACTION—Cause of—Issue of writ—Company — Debenture — Floating security — Jeopardy—Receiver – – – **62**
See COMPANY. 7.

ADMINISTRATION—*Imperfect Gift of Personalty—Bonds to Bearer—Continuing Intention to give—Donee appointed one of the Executors.*

The principle laid down by Jessel M.R. in *Strong* v. *Bird*, (1874) L. R. 18 Eq. 315—that where a testator has expressed in his lifetime an intention to give personal estate belonging to him to one who becomes his executor, the intention to give continuing, the donee is entitled to hold the property for his own benefit—is not confined to the release of a debt ; and it is immaterial whether the donee is the only executor or one of several. *In re* STEWART. STEWART *v.* MCLAUGHLIN – – – **Neville J. 251**

2. —— *Real Assets—Devise on Trust—Alienation by "Devisee"—Mortgage of Equitable Estate—Purchaser for Value without Notice—Bona fide Alienation—Priority over Creditor of Testator—Debts Recovery Act*, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 47), *ss.* 6, 8—*Administration of Estates Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 104).

An equitable tenant for life is a "devisee" within the meaning of ss. 6 and 8 of the Debts Recovery Act, 1830, and consequently a bona fide alienation by such a devisee before action brought will be protected, there being no difference for this purpose between the alienee of an equitable and the alienee of a legal interest.

Dictum of Lord Chelmsford L.C. in *Coope* v. *Cresswell*, (1866) L. R. 2 Ch. 112, 122, explained and adopted.

British Mutual Investment Co. v. *Smart*, (1875) L. R. 10 Ch. 567, and *In re Hedgely*, (1886) 34 Ch. D. 379, examined and applied.

Decision of Joyce J., [1908] W. N. 18, reversed. *In re* ATKINSON. PROCTOR *v.* ATKINSON – – – – – **C. A. 307**

3. —— *Real Estate — Exoneration — Estate Duty — "Equitable Charge" — Real Estate Charges Acts, (Locke King's Act)* 1854 (17 *&* 18 *Vict. c.* 113) *and* 1877 (40 *&* 41 *Vict. c.* 34)—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 8, *sub-s.* 13 ; *s.* 9, *sub-s.* 1.

The charge created by s. 2, sub-s. 1, of the Finance Act, 1894, whereby estate duty is charged upon property, is an "equitable charge" within the Real Estate Charges Act, 1877. Where, therefore, land descended on an intestacy in 1904 to B., who himself died intestate in 1907 without having paid the estate duty which became payable on the death of his predecessor :—

Held, that the Real Estate Charges Act, 1877, applied, and that B.'s heir-at-law was not entitled to have the land exonerated from payment of the duty by the personal estate. *In re* BOWERMAN. PORTER *v.* BOWERMAN – – **Joyce J. 340**

4. —— *Statute-barred Debt owing to Estate—Residuary Legatee of Debtor's Estate also a Legatee of Creditor's Estate — Bringing into Account.*

J. B., entitled to a share in the residuary estate of his father, was also the sole residuary legatee and one of the executors of his aunt, who was a debtor for 200*l.* to the father's estate. This debt was long ago statute-barred :—

Held, that this debt and interest need not be brought into account as against J. B.'s share in his father's residuary estate.

Courtenay v. *Williams*, (1844) 3 Hare, 539 ; on appeal, (1846) 15 L. J. (Ch.) 204, distinguished.

Decision of Neville J., [1908] 1 Ch. 850, reversed. *In re* BRUCE. LAWFORD *v.* BRUCE **C. A. 682**

5. —— *Will — Immediate Gift of Share of Residue—Debt due from Beneficiary to Testator*

ADMINISTRATION—*continued.*

payable by Instalments—Right of Executors to retain Share to answer Debt.

Where at the death of a testator a debt is owing to him by a person to whom a share of residue is immediately given by the will, but the debt is payable by instalments, the executors are not entitled to retain the share of the beneficiary as against the future instalments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such instalments.

In re Rees, (1889) 60 L. T. 260, followed. *In re Akerman*, [1891] 3 Ch. 212, distinguished. *In re* ABRAHAMS. ABRAHAMS *v.* ABRAHAMS **Warrington J. 69**

—— Victoria Administration and Probate Act—Will—Direction to pay debts out of residue—Colonial death duties – **365**
See WILL. 4.

—— Will—Lapse—Death of all beneficiaries and executor before testator—Administration cum testamento annexo—"Intestate" – – – – **500**
See WILL. 7.

ADMIRALTY.
See under SHIPPING.

ADMISSIBILITY—Evidence.
See under EVIDENCE.

ADVERTISEMENTS—Trade Mark—Company—Name or signature—Honest concurrent user – – – – – **86**
See TRADE MARK. 4.

AFFILIATION—*Bastardy Order—Weekly Payment—Death of Putative Father—Enforcement of Order — Liability of Father's Estate — Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 4.

The liability of the putative father under a bastardy order is purely personal; and if the father dies the mother has no right to claim against his estate either arrears or future payments. *In re* HARRINGTON. WILDER *v.* TURNER – – – **Warrington J. 687**

ALIENATION—By "devisee"—Real assets—Devise on trust—Mortgage of equitable estate—Purchaser—Priority over creditor of testator – – – **307**
See ADMINISTRATION. 2.

ALLOTMENT—Cheques cleared and honoured after allotment—Notice of avoidance within one month of statutory meeting
See COMPANY. 1. **228**

—— Proceeding to allotment—Liability of directors—"Knowingly contravene"
See COMPANY. 2. **240**

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

APPROPRIATION — Company — Debenture-holders' action — Supposed deficient

APPROPRIATION—*continued.*

security—Principal and interest—Payments on account—Appropriation of payments – – – – – **652**
See COMPANY. 4.

ARBITRATION—Company—Winding-up—Sale of undertaking—Dissentient member—Purchase of interest—Right of dissentient member to examine officers prior to arbitration – – – **450**
See COMPANY. 8.

ARREARS—Rates—Judgment—Retrospective rate—Mandamus—Discretion – **321**
See RATES.

ASSIGN—Covenant not to assign without consent—Power of re-entry on breach—Statutory powers—Waterworks company – – – – – **214**
See LANDLORD AND TENANT.

ASSIGNMENT—Patent.
See under PATENT.

AUSTRALIA—Victoria Administration and Probate Act—Will—"Debts"—Colonial death duty – – – – **365**
See WILL. 4.

BANK—Specific legacy—Misdescription—Shares in a bank—Absorption by another bank—Extrinsic evidence – – **111**
See WILL. 8.

BANKRUPTCY—Patent—Vendor's lien for unpaid royalties—Damages—Election
See PATENT. 1. **127**

BASTARDY—Bastardy order—Weekly payment—Death of putative father—Liability of father's estate – – – **687**
See AFFILIATION.

BERNE CONVENTION, 1887, arts. 2, 7, 9 – **198**
See COPYRIGHT. 1.

BIRDS—Tidal and navigable river—Right of public to shoot wild fowl – – **139**
See FORESHORE.

BOARD OF EDUCATION — Jurisdiction of—Scheme of Endowed Schools Commissioners—Alteration of – – **25**
See SCHOOLS.

BOARD OF EDUCATION (POWERS) ORDERS IN COUNCIL, 1900–1902 – – **25**
See SCHOOLS.

BONDS—Imperfect gift of personalty—Bonds to bearer—Continuing intention to give—Donee appointed one of the executors – – – – – **251**
See ADMINISTRATION. 1.

BREACH OF COVENANT.
See under COVENANT.

BRIDGE—Telephone—Bridge carrying public road over railway—Power to lay cable along bridge—Consent – – **514**
See TELEGRAPH.

BUILDING SCHEME—Restrictive covenants—Rights of purchasers inter se—Restriction to vendor of right to dispense with restrictions – – – – **665**
See VENDOR AND PURCHASER.

BURIAL—*Burial Fees—Public Burial Ground—Fees other than for Services rendered—Burial Act*, 1900 (63 & 64 *Vict. c.* 15), *s.* 3, *sub-s.* 4.

At the time of the passing of the Burial Act, 1900, the parish of Tooting Graveney possessed an old churchyard still open for burials, and the rector was entitled to charge in respect of such burials "fees other than for services rendered." This parish and four others had by virtue of the London Government Act, 1899, and schemes made thereunder been formed into the borough of Wandsworth and united for civil purposes into one parish called the parish of Wandsworth Borough. At the time of the union all the parishes except Tooting Graveney had adopted the Burial Acts, and three of them had separate public burial grounds provided under those Acts and used by their own parishioners only. The scheme of union provided that the Burial Acts should be in force and be administered by the borough council uniformly throughout the borough. After the union the three public burial grounds above mentioned were used for the whole borough, and parishioners of Tooting Graveney were from time to time buried there. The rector or his representative officiated at these burials, and he claimed to be entitled to the same fees as were paid in the churchyard :—

Held, that the rector had not at the time of the passing of the Act been entitled to any fees in respect of any matter arising in the three public burial grounds, and therefore the proviso in s. 3, sub-s. 4, of the Burial Act, 1900, did not apply and the "fees other than for services rendered" were not payable. ANDERSON *v.* WANDSWORTH BOROUGH COUNCIL.

Neville J. 81

2. —— *Burial Ground — Vested in Rector and Churchwardens—Part consecrated and used as Cemetery—Part unconsecrated and used as Site for Houses—Closed by Order in Council—Right to administer Income of Houses—Vestry—Parish—Borough Council—Power relating to Affairs of Church—Church Property—Burial Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 24—*London Government Act*, 1899 (62 & 63 *Vict. c.* 14), *ss.* 4, 23.

The functions of the vestry of St. George, Hanover Square, were twofold, first in relation to the affairs of the church, secondly in relation to secular affairs. In 1757 the vestry bought land for the purpose of a burial ground, the purchase-money being provided out of ecclesiastical funds. By a private Act of Parliament this land was vested in the vicar and churchwardens of the parish for the use of the inhabitants of the parish as a burial ground. The rector and his successors were to take the burial fees. Part of the land was consecrated in 1765 and used as a burial ground and a site for a chapel; the rest remained unconsecrated. In 1767 and 1768 the rector and churchwardens, acting under the direction of the vestry, granted building leases for ninety-nine years of the unconsecrated land. The ground rents were received by the churchwardens and accounted for by them as part of the revenues of the church. In 1854 the burial ground was closed by an Order in Council pursuant to the Burial Act, 1852, and a burial board was constituted for the parish with a new burial ground. From 1854 to 1865 the ground rents were paid to the burial board. The building leases then fell in, and the rector and churchwardens, acting under the direction of the vestry, renewed the leases for twenty-one years at increased rents, and from that time the rents were collected by the vestry clerk, paid to the management account of the vestry, and applied as part of the ordinary revenues of the parish. In 1900 the buildings were pulled down and fresh building leases were granted. The council of the city of Westminster claimed to be entitled to administer the income of the property for the benefit of the parish.

By s. 24 of the Burial Act, 1857, power to let and sell the unconsecrated parts of disused burial grounds was given to the trustees thereof, and the net moneys received by them were to be applied in discharge of incumbrances, and the residue for the benefit of the parish as the vestry should direct.

By s. 4 of the London Government Act, 1899, the powers and property of vestries were transferred to borough councils, but by s. 23 powers relating to the affairs of the church and interests in church property were excepted :—

Held, that the houses in question came within s. 24 of the Act of 1857, that the word "parish" in that section meant not the ecclesiastical but the civil parish as defined by the Burial Act, 1852, and that this power of the vestry to direct the application of the rents was not a power relating to the affairs of the church within s. 23 of the Act of 1899, but had passed to the council under s. 4, although but for s. 24 of the Act of 1857 his Lordship would have held that the land must be treated as a whole and that the power did relate to the affairs of the church. MAYOR OF WESTMINSTER *v.* RECTOR AND CHURCHWARDENS OF ST. GEORGE, HANOVER SQUARE.

Warrington J. 600

CABLE—Telephone—Power to lay cable along bridge without consent of railway company — Consent of Postmaster-General – – – – – **514**
See TELEGRAPH.

CASES :—

—— *Akerman, In re* – [1891] 3 Ch. 212.
Distinguished by Warrington J. *In re* ABRAHAMS – – **[1908] 2 Ch. 69**

—— *Atkinson, In re* – [1908] W. N. 18.
Reversed by C. A. – **[1908] 2 Ch. 307**

—— *Attorney-General* v. *Hubbuck*, (1884) 13 Q. B. D. 275.
Distinguished by C. A. *In re* LORD GRIMTHORPE – – **[1908] 2 Ch. 675**

CASES—*continued.*

—— *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146.
Followed by Neville J. DANSK REKYLRIFFEL SYNDIKAT AKTIESELSKAB *v.* SNELL – – – **[1908] 2 Ch. 127**

—— *Barraclough* v. *Cooper*, (1905) H. L. (E.).
Reported [1908] 2 Ch. 121, n.
Followed by Eve J. *In re* LAMBERT **[1908] 2 Ch. 117**

—— *Bellairs* v. *Bellairs*, (1874) L. R. 18 Eq. 510.
Considered and explained by Warrington J. *In re* OLIVER – **[1908] 2 Ch. 74**

—— *Bonham* v. *Newcomb*, (1684) 1 Vern. 232.
Distinguished by Warrington J. *In re* CARSHALTON PARK ESTATE, LIMITED **[1908] 2 Ch. 62**

—— *British and American Trustee and Finance Corporation* v. *Couper*, [1894] A. C. 399.
Applied by Eve J. *In re* JEWISH COLONIAL TRUST (JUEDISCHE COLONIALBANK), LIMITED **[1908] 2 Ch. 287**

—— *British Mutual Investment Co.* v. *Smart*, (1875) L. R. 10 Ch. 567.
Examined and applied by C. A. *In re* ATKINSON – – **[1908] 2 Ch. 307**

—— *Bruce, In re, Lawford* v. *Bruce*, [1908] 1 Ch. 850.
Reversed by C. A. – **[1908] 2 Ch. 682**

—— *Burgess* v. *Booth* – [1908] 1 Ch. 880.
Reversed by C. A. – **[1908] 2 Ch. 648**

—— *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305.
Principle of, applied by Neville J. BUTTERLEY COMPANY *v.* NEW HUCKNALL COLLIERY COMPANY **[1908] 2 Ch. 475**

—— *Chesterfield (Lord)* v. *Harris*, [1908] 1 Ch. 230.
Reversed by C. A. – **[1908] 2 Ch. 397**

—— *Clarke* v. *Franklin*, (1858) 4 K. & J. 257.
Distinguished by C. A. *In re* LORD GRIMTHORPE – – **[1908] 2 Ch. 675**

—— *Coope* v. *Cresswell*, (1866) L. R. 2 Ch. 112, 122.
Dictum of Lord Chelmsford L.C. in, explained and adopted by C. A. *In re* ATKINSON – – **[1908] 2 Ch. 307**

—— *Copestake* v. *Hoper* – [1907] 1 Ch. 366.
Reversed by C. A. – **[1908] 2 Ch. 10**

—— *Cornbrook Brewery Co.* v. *Law Debenture Corporation*, [1904] 1 Ch. 103.
Distinguished by Swinfen Eady J. CUNARD STEAMSHIP COMPANY *v.* HOPWOOD – – – **[1908] 2 Ch. 564**

—— *Corser* v. *Cartwright*, (1875) L. R. 7 H. L. 731, 736.
Applied by Swinfen Eady J. *In re* HENSON – – – **[1908] 2 Ch. 356**

—— *Courtenay* v. *Williams*, (1844) 3 Hare, 539; on appeal, (1846) 15 L. J. (Ch.) 204.
Distinguished by C. A. *In re* BRUCE **[1908] 2 Ch. 682**

CASES—*continued.*

—— *Croydon Corporation* v. *Croydon Rural Council*, [1908] 1 Ch. 222.
Order of Neville J. varied by C. A. **[1908] 2 Ch. 321**

—— *Darnley (Earl of), In re*, [1907] 1 Ch. 159.
Followed by Warrington J. *In re* OLIVER – – – **[1908] 2 Ch. 74**

—— *Dimes* v. *Petley* – (1850) 15 Q. B. 276.
Referred to by Neville J. LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY *v.* MERSEY TRADING COMPANY **[1908] 2 Ch. 460, 473**

—— *Dixon* v. *Metropolitan Board of Works*, (1881) 7 Q. B. D. 418.
Distinguished by C. A. PRICE'S PATENT CANDLE COMPANY *v.* LONDON COUNTY COUNCIL – – **[1908] 2 Ch. 526**

—— *Elliston* v. *Reacher* – [1908] 2 Ch. 374.
Affirmed by C. A. – **[1908] 2 Ch. 665**

—— *English and Colonial Produce Co., In re*, [1906] 2 Ch. 435, 439.
Overruled on one point by C. A. *In re* NATIONAL MOTOR MAIL-COACH COMPANY – – – **[1908] 2 Ch. 515**

—— *Forbes* v. *Peacock*, (1846) 1 Ph. 717, 721.
Applied by Swinfen Eady J. *In re* HENSON – – – **[1908] 2 Ch. 356**

—— *Freke* v. *Carbery (Lord)*, (1873) L. R. 16 Eq. 461.
Applied by Swinfen Eady J. *In re* MOSES – – – **[1908] 2 Ch. 235**

—— *Garvey* v. *Hibbert* – (1812) 19 Ves. 125.
Principle of, applied by C. A. *In re* SHARP – – – **[1908] 2 Ch. 190**

—— *Genery* v. *Fitzgerald* – (1822) Jac. 468.
Considered and explained by Warrington J. *In re* OLIVER **[1908] 2 Ch. 74**

—— *Gentili, In the Goods of*, (1875) Ir. R. 9 Eq. 541.
Applied by Swinfen Eady J. *In re* MOSES – – – **[1908] 2 Ch. 235**

—— *Glasgow Pavilion, Ld.* v. *Motherwell*, (1903) 6 F. 116.
Distinguished by Swinfen Eady J. *In re* NATIONAL MOTOR MAIL-COACH COMPANY – – **[1908] 2 Ch. 228**

—— *Gorringe* v. *Mahlstedt* – [1907] A. C. 225.
Distinguished by Eve J. *In re* LAMBERT – – – **[1908] 2 Ch. 117**

—— *Great Western Ry. Co.* v. *Midland Ry. Co.*, [1908] 2 Ch. 455.
Affirmed on one point and overruled on the main question of construction by C. A. – – – **[1908] 2 Ch. 644**

—— *Grimthorpe (Lord), In re, Beckett* v. *Lord Grimthorpe*, [1908] 1 Ch 666.
Differed with on one point but affirmed in the result by C. A. **[1908] 2 Ch. 675**

—— *Harrogate Estates Ld., In re*, [1903] 1 Ch. 498.
Applied by Swinfen Eady J. CUNARD STEAMSHIP COMPANY *v.* HOPWOOD **[1908] 2 Ch. 564**

CASES—*continued.*

—— *Hedgely, In re* – (1886) 34 Ch. D. 379.
Examined and applied by C. A. *In re* ATKINSON – – [1908] 2 Ch. 307

—— *Johnson* v. *Kennett*, (1835) 3 My. & K. 624, 630.
Applied by Swinfen Eady J. *In re* HENSON – – – [1908] 2 Ch. 356

—— *Joseph, In re, Pain* v. *Joseph*, [1908] 1 Ch. 599.
Reversed by C. A. – [1908] 2 Ch. 507

—— *Lodge* v. *National Union Investment Co.*, [1907] 1 Ch. 300.
Distinguished by Eve J. CHAPMAN *v.* MICHAELSON – – [1908] 2 Ch. 612

—— *Loring* v. *Thomas*, (1861) 1 Dr. & Sm. 497.
Followed by Eve J. *In re* LAMBERT [1908] 2 Ch. 117

—— *Mansell* v. *Valley Printing Co.*, [1908] 1 Ch. 567.
Affirmed by C. A. – [1908] 2 Ch. 441

—— *Maurice, In re* – (1896) 75 L. T. 415.
Distinguished by Swinfen Eady J. *In re* BREWSTER – – [1908] 2 Ch. 365

—— *Mears* v. *Western Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, 360.
Applied by Swinfen Eady J. *In re* NATIONAL MOTOR MAIL-COACH COMPANY – – – [1908] 2 Ch. 228
Referred to by Neville J. BURTON *v.* BEVAN – – [1908] 2 Ch. 240

—— *Morgan's Case* – (1884) 28 Ch. D. 620.
Applied by Swinfen Eady J. *In re* BRITISH BUILDING STONE COMPANY [1908] 2 Ch. 450

—— *Osborne* v. *Bradley* – [1903] 2 Ch. 446.
Distinguished by C. A. ELLISTON *v.* REACHER – – [1908] 2 Ch. 665

—— *Peter* v. *Stirling* – (1878) 10 Ch. D. 279.
Distinguished by Swinfen Eady J. *In re* BREWSTER – [1908] 2 Ch. 365

—— *Phillips* v. *Cayley*, (1889) 43 Ch. D. 222.
Distinguished by Swinfen Eady J. *In re* LANE – – [1908] 2 Ch. 581

—— *Poole* v. *National Bank of China, Ld.*, [1907] A. C. 229.
Applied by Eve J. *In re* JEWISH COLONIAL TRUST (JUEDISCHE COLONIALBANK), LIMITED [1908] 2 Ch. 287

—— *Postmaster-General* v. *National Telephone Co.*, [1907] 1 Ch. 621.
Reversed by C. A. – [1908] 2 Ch. 172

—— *Rebbeck, In re*, [1894] W. N. 68; 42 W. R. 473.
Distinguished by Swinfen Eady J. *In re* HENSON – – [1908] 2 Ch. 356

—— *Rees, In re* – – (1889) 60 L. T. 260.
Followed by Warrington J. *In re* ABRAHAMS – – [1908] 2 Ch. 69

—— *Renals* v. *Cowlishaw*, (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.
Principle of, applied by Parker J. ELLISTON *v.* REACHER – [1908] 2 Ch. 374; affirmed on appeal, C. A. [1908] 2 Ch. 665

—— *Rolt, In re* – – – [1908] W. N. 76.
Applied by Swinfen Eady J. *In re* LANE – – – [1908] 2 Ch. 581

—— *Sarpy v. Holland* – [1908] 1 Ch. 443.
Reversed on one point by C. A. [1908] 2 Ch. 198

—— *Scott* v. *Scott* – (1882) 9 L. R. Ir. 367.
Disapproved by C. A. BURGESS *v.* BOOTH – – [1908] 2 Ch. 648

—— *Searle, In re* – – [1900] 2 Ch. 829.
Followed by Warrington J. *In re* OLIVER – – [1908] 2 Ch. 74

—— *Selwyn* v. *Garfit* – (1888) 38 Ch. D. 273.
Distinguished by Swinfen Eady J. BARKER *v.* ILLINGWORTH [1908] 2 Ch. 20

—— *Sharp, In re, Maddison* v. *Gill*, [1908] 1 Ch. 372.
Affirmed by C. A. – [1908] 2 Ch. 190

—— *South Eastern Ry. Co. v. National Telephone Co.*, [1908] 2 Ch. 50.
Affirmed by C. A. – [1908] 2 Ch. 514

—— *Spicer* v. *Martin*, (1888) 14 App. Cas. 12.
Principle of, applied by Parker J. ELLISTON *v.* REACHER, [1908] 2 Ch. 374; affirmed on appeal, C. A. [1908] 2 Ch. 665

—— *Steed* v. *Preece*, (1874) L. R. 18 Eq. 192.
Applied by C. A. BURGESS v. BOOTH [1908] 2 Ch. 648

—— *Strong* v. *Bird*, [1874] L. R. 18 Eq. 315.
The principle laid down by Jessel M.R. in, applied by Neville J. *In re* STEWART – – [1908] 2 Ch. 251

—— *Stroughill* v. *Anstey*, (1832) 1 D. M. & G. 635, 653.
Applied by Swinfen Eady J. *In re* HENSON – – [1908] 2 Ch. 356

—— *Teape's Trusts, In re*, (1873) L. R. 16 Eq. 442.
Distinguished by Swinfen Eady J. *In re* LANE – – [1908] 2 Ch. 581

—— *Tiverton and North Devon Ry. Co.* v. *Lousemore*, (1884) 9 App. Cas. 480.
Explained and followed by Warrington J. GREAT WESTERN RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY, [1908] 2 Ch. 455; on appeal, see GREAT WESTERN RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY, C. A. [1908] 2 Ch. 644

—— *Venn and Furze's Contract, In re*, [1894] 2 Ch. 101, 114.
Applied by Swinfen Eady J. *In re* HENSON – – [1908] 2 Ch. 356

CASES—*continued.*

—— *Waterhouse, In re*, (1907) 96 L. T. 688 ; 98 L. T. 30.
Applied by Swinfen Eady J. *In re* LANE – – – [1908] 2 Ch. 581

—— *Wentworth* v. *Wentworth*, [1900] A. C. 163, 171.
Dictum of Lord Macnaghten in, considered and explained by Warrington J. *In re* OLIVER – – [1908] 2 Ch. 74

—— *Werderman* v. *Société Générale d'Électricité*, (1881) 19 Ch. D. 246.
Followed by Neville J. DANSK REKYLRIFFEL SYNDIKAT AKTIESELSKAB *v.* SNELL – – – [1908] 2 Ch. 127

—— *Wrightson, In re* – – [1904] 2 Ch. 95.
Explained by Parker J. WHITE *v.* SUMMERS – – [1908] 2 Ch. 256

—— *Wye Valley Ry. Co.* v. *Hawes*, (1880) 16 Ch. D. 489.
Commented upon by Joyce J. FURNESS, WITHY & Co. *v.* PICKERING [1908] 2 Ch. 224

—— *Yolland, Husson & Birkett, Ld., In re*, [1908] 1 Ch. 152.
Applied by Swinfen Eady J. CUNARD STEAMSHIP COMPANY *v.* HOPWOOD [1908] 2 Ch. 564

—— *Yorkshire Miners' Association* v. *Howden*, [1905] A. C. 256.
Followed by Eve J. COPE *v.* CROSSINGHAM – – – [1908] 2 Ch. 624

CHARGE—Company—Debentures.
See under COMPANY.

—— "Equitable charge"—Exoneration—Estate duty – – – – – 340
See ADMINISTRATION. 3.

—— Mortgage.
See under MORTGAGE.

—— Will—Construction.
See under WILL.

CHARITY—Schools—Charitable Trusts.
See under SCHOOLS.

"CHARTREUSE"—Secondary meaning of name—French law of associations – 715
See TRADE MARK. 1.

CLASS—Will—Inaccurate enumeration—Mistake—Rejection of specified number
See WILL. 6. 190

—— Words of futurity—Residue—Will—Construction – – – 1, 117, 121, n.
See WILL. 9—11.

COAL—Mines—Overlying and underlying seams of coal—Right to support—Subsidence—Injunction – – – – 475
See MINES.

CODICIL.
See under WILL.

COLONIES—Will—Direction to pay debts out of residue — Specific devise of Colonial property—Colonial death duty – 365
See WILL. 4.

COMMISSION—*Contract—Personal Contract—Death of Party—Commission payable "as long as we do Business."*

The defendants agreed with W. to pay him 5 per cent. commission on all accounts introduced by him so long as they did business with the persons he placed on their books :—

Held, that the commission on accounts introduced by W. continued to be payable to his executors after his death so long as the defendants continued to do business with the persons introduced by him. WILSON *v.* HARPER
Neville J. 370

COMPANY—*Allotment—Minimum Subscription—Application Money—Paid to and received by the Company—Cheques cleared and honoured after Allotment — Delay in Presentment — Irregular Allotment—Notice of Avoidance within one Month of Statutory Meeting—Legal Proceedings after one Month — Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 5.

Where a cheque for application money for shares forming part of the minimum subscription for allotment is received on the day of allotment, but not paid into the company's bank until some days later, the application money cannot be treated as "paid to and received by the company" before allotment within s. 4 of the Companies Act, 1900, although the cheque is duly honoured.

Mears v. *Western Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, 360, applied.

Glasgow Pavilion, Ld. v. *Motherwell*, (1903) 6 F. 116, distinguished.

Sect. 5, which renders an allotment to an applicant in contravention of s. 4 "voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later," does not require actual legal proceedings to be taken within the month as a condition of avoidance. Notice of avoidance within the month followed by prompt legal proceedings after the month is sufficient.

Semble, the notice need not specify the ground of avoidance. *In re* NATIONAL MOTOR MAIL-COACH COMPANY, LIMITED. ANSTIS' AND MCLEAN'S CLAIMS – Swinfen Eady J. 228

2. —— *Allotment, Proceeding to—Proportion of Shares applied for—Application Money not paid—Liability of Directors—"Knowingly contravene"—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 4, 5.

A company issued a prospectus offering 20,000 1*l.* preference shares to the public and stating that no allotment would be made unless 15,000 shares had been applied for and the application money paid. The plaintiff applied for 100 shares. The directors proceeded to allotment when 15,000 shares had been applied for, but in some cases the application money had only been paid by cheques which had not been cleared. The plaintiff paid the full amount of his shares. The company went into liquidation, and it then appeared that the company was

insolvent and the shares worthless. The plaintiff brought this action against one of the directors, claiming repayment of the money paid on application for the shares under s. 4 and compensation for loss under s. 5 of the Companies Act, 1900. The defendant was not present at the meeting of the board at which the allotment was made, but was present at subsequent meetings at which the minutes were confirmed and a resolution passed to apply for a certificate to commence business :—

Held that, *Mears* v. *Western Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, having decided that payment by cheque is not payment within s. 4 of the Companies Act, 1900, until the cheque is cleared, there had been a contravention of the Act.

Sect. 4 applies only before allotment. After allotment is once made, whether in contravention of the Act or not, it is only voidable at the option of the shareholder, and the company cannot pay back the application money ; the only liability of the directors after allotment is the liability to make good the loss under s. 5, sub-s. 2, of the Act. Under that section, "knowingly contravene" means contravene with knowledge of the facts. A director cannot escape liability by ignorance of the law.

But a director does not make himself responsible for an act done at a meeting at which he was not present, and which is complete without further confirmation, merely by voting at a subsequent meeting for the confirmation of the minutes.

Held, also, on all the evidence, that the defendant was not aware of the facts and had not knowingly contravened the Act. BURTON *v.* BEVAN - - - - **Neville J. 240**

3. —— *Costs—Preliminary Expenses—Registration Fees—Stamp Duty on Capital—Payment by Promoter—Liability of Company—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 17—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 112—*Finance Act*, 1899 (62 & 63 *Vict. c.* 9), *s.* 7.

The mere fact that a promoter pays the registration fees and ad valorem stamp duty on the registration of a company does not in itself entitle him to recover them from the company.

Judgment of Buckley J. in *In re English and Colonial Produce Co.*, [1906] 2 Ch. 435, 439, overruled on this point. *In re* NATIONAL MOTOR MAIL-COACH COMPANY. CLINTON'S CLAIM - - - - - - **C. A. 515**

4. —— *Debenture—Debenture-holders' Action—Supposed deficient Security—Principal and Interest—Payments on account—Appropriation of Payments—Orders directing Distribution of Dividend—Subsequent Surplus.*

A debenture trust deed provided that the trustees should, in case of default by the company, apply the net proceeds of any realization of the securities, first in payment of interest, secondly of the principal, due on the debentures. The company made default, and a representative action was brought on behalf of the debenture-holders to enforce their security, in which the trusts of the deed were ordered to be carried into execution and the usual accounts were directed. The Master certified the amounts due to the various debenture-holders for principal, but, as the security was believed to be insufficient, he forbore to compute interest. The securities were gradually realized, and orders were made in chambers from time to time whereby dividends of 5*s.* in the pound, 10*s.* in the pound, and 5*s.* in the pound were directed to be paid "on the principal sums by the Master's certificate certified to be due to" the debenture-holders ; the last of the dividends being further described as "the balance of the principal sum" so certified. A further sum was subsequently received sufficient to pay all arrears of interest and leave a small surplus for the company. The question now raised was whether by the terms of these orders the debenture-holders had lost their rights under the trust deed :—

Held (affirming the decision of Joyce J.), that there had been no final and complete appropriation by these orders as between principal and interest, and that the debenture-holders were entitled to receive the whole of their arrears of interest in accordance with the provisions of the trust deed, before any surplus was payable to the company. From the first the Court had professed to be carrying into effect the trusts of this deed and not to be varying those trusts. *In re* CALGARY AND MEDICINE HAT LAND COMPANY. PIGEON *v.* THE COMPANY - - **C. A. 652**

5. —— *Debenture Stock—Covering Deed—Specific Ships—Specific ancillary Mortgages—Substituted Security—Registration—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 14.

Sect. 14, sub-s. 4, of the Companies Act, 1900, applies to an issue of debenture stock secured by a covering deed containing any charge to the benefit of which the stockholders of that issue are entitled pari passu. If the covering deed contains specific equitable charges on specific ships, and the particulars required by s. 14, sub-s. 4, are registered, then for the purposes of s. 14 that registration will not only cover subsequent statutory mortgages of those specific ships required to complete the security, but also statutory mortgages of any ships substituted therefor under the powers of the covering deed.

In re Harrogate Estates, Ld., [1903] 1 Ch. 498, and *In re Yolland, Husson & Birkett, Ld.*, [1908] 1 Ch. 152, applied.

Cornbrook Brewery Co. v. *Law Debenture Corporation*, [1904] 1 Ch. 103, distinguished. CUNARD STEAMSHIP COMPANY, LIMITED *v.* HOPWOOD - - - **Swinfen Eady J. 564**

6. ——*Memorandum of Association—Alteration — Fundamental Objects — Abandonment — Confirmation by Court—Jurisdiction—Discretion —Questions for Consideration—Principles applicable—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-ss.* 4, 5 (*e*).

The Court has jurisdiction under s. 1, sub-s. 5 (*e*), of the Companies (Memorandum of Association) Act, 1890, to confirm an alteration in the memorandum of association of a company involving the abandonment of objects of a

fundamental character and limiting the operations of the company from a world-wide area to a comparatively small prescribed region. But in a case where the constitution of the company placed it in the power of the controlling body of the company, who were in favour of such an alteration, to permit the extended powers of the company to lie dormant, and where the vast majority of the shareholders, representing over three-fourths of the share capital, had given no indication of their wishes on the subject, the Court refused to sanction the proposed alteration.

The provisions of sub-s. 5 of s. 1 of the Act furnish the only test for determining the question whether the Court has jurisdiction to sanction a proposed alteration of the memorandum of association.

The principles which have been laid down for the guidance of the Court in dealing with applications for confirmation of reduction of capital under s. 11 of the Companies Act, 1867, apply to the case of applications for confirmation of an alteration of the memorandum of association under s. 1 of the Companies (Memorandum of Association) Act, 1890, and, accordingly, all that the Court has to decide is whether the alteration is fair and equitable as between the members of the company. The Court is not concerned to consider the wisdom or desirability of the proposed alteration.

British and American Trustee and Finance Corporation v. *Couper*, [1894] A. C. 399, and *Poole* v. *National Bank of China, Ld.*, [1907] A. C. 229, applied. *In re* JEWISH COLONIAL TRUST (JUEDISCHE COLONIALBANK), LIMITED **Eve J. 287**

7. —— *Practice—Cause of Action—Issue of Writ—Debenture—Floating Security—Principal not yet payable—Interest not in default—Jeopardy—Receiver.*

The Court has jurisdiction to appoint a receiver and manager of the undertaking and assets of a company on the application of the holder of a debenture issued by the company, secured by a floating charge, if the principal money thereby secured has become due before the time when the application is made, although at the date of the issue of the writ no default had been made in payment of interest, the money was not payable, and the security was not in jeopardy.

The holder of a debenture secured by a floating charge on the assets of the company issued a writ in an action claiming an account, execution of the trusts of the debenture trust deed, realization of the security, and the appointment of a receiver and manager. At the date of the issue of the writ the principal money secured was not due and no default had been made in payment of interest. The plaintiff moved for the appointment of a receiver and manager, but the motion was refused on the ground that the money was not due, no default had been made, and the security was not in jeopardy. After the money became due the plaintiff served another notice of motion for the appointment of a receiver and manager. This was opposed on the ground that the plaintiff had no cause of action when he issued his writ and that the action could not be maintained :—

Held, that the plaintiff as the holder of a floating security had a right to issue his writ before the money became payable, and that the Court had jurisdiction, inasmuch as the money was now payable, to appoint a receiver and manager.

Bonham v. *Newcomb*, (1684) 1 Vern. 232, distinguished. *In re* CARSHALTON PARK ESTATE, LIMITED. GRAHAM *v.* THE COMPANY. TURNELL *v.* THE COMPANY – – **Warrington J. 62**

8. —— *Winding-up—Sale of Undertaking—Dissentient Member—Purchase of Interest—Arbitration—Right of dissentient Member to examine Officers prior to Arbitration—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 115, 161, 162.

Where the undertaking of a company in voluntary liquidation is being sold to another company under s. 161 of the Companies Act, 1862, and the liquidator has elected to purchase the interest of a dissentient member at a price to be determined by arbitration under s. 162, the Court will not give that dissentient member liberty to examine the officers of the company under s. 115 with the view of obtaining evidence to enhance the value of his interest in the arbitration.

Morgan's Case, (1884) 28 Ch. D. 620, applied. *In re* BRITISH BUILDING STONE COMPANY. **Swinfen Eady J. 450**

—— Railway Company.
See under RAILWAY.

—— Trade mark—Registration—Honest concurrent user—Name or signature—Advertisements – – – – **86**
See TRADE MARK. 4.

—— Will—Bequest of "all my debentures" in a company—Testator holding debentures and debenture stock – – **493**
See WILL. 3.

COMPULSORY POWERS—Railway company—Powers exercisable for limited period—Expiration of time allowed—Power to construct railway – – – **644**
See RAILWAY.

COMPULSORY PURCHASE — Costs — Lands Clauses Acts – – – – **691**
See PRACTICE. 1.

CONFLICT OF LAWS—*English Will—Residuary Gift—Life Tenant and Remainderman—Transvaal Leaseholds—Enjoyment in Specie—Roman-Dutch Law.*

A testator domiciled in England made an English will by which he gave, devised, and bequeathed all his real and personal estate, both in England and South Africa, to his wife for her widowhood, with remainders over.

The property included long leaseholds in the Transvaal, where the Roman-Dutch law prevails :—

Held, that the Roman-Dutch law (as stated in an uncontested opinion of an ex-Chief Justice

CONFLICT OF LAWS—*continued.*

of the Transvaal) was applicable to the Transvaal leaseholds, and the widow was consequently entitled to enjoy them in specie.

Freke v. *Lord Carbery*, (1873) L. R. 16 Eq. 461, and *In the Goods of Gentili*, (1875) Ir. R. 9 Eq. 541, applied.

In re MOSES. MOSES *v.* VALENTINE.
Swinfen Eady J. 235

—— Divorce—Foreign jurisdiction—Putative marriage—Legitimacy of issue—Law of Scotland – – – – – **344**
See MARRIAGE.

CONTINGENT REMAINDER — Or executory devise—Will—Construction – **256**
See WILL. 2.

CONTRACT — Commission — Death of party — Commission payable "as long as we do business" – – – – – **370**
See COMMISSION.

CONVERSION—*Personalty into Realty—Direction to hold Proceeds of Personalty upon the Trusts and in Manner applicable if they had arisen from a Sale under the Settled Land Act*, 1882—*Will—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 ; *s.* 22, *sub-s.* 5 ; *s.* 24, *sub-s.* 3.

Although the Legislature can, by a simple enactment to that effect, make personalty devolve and pass to a series of persons successively for the same interests as if it had been realty, an individual can only do so by the creation of an imperative trust for the conversion of the personalty into realty and for the settlement of that realty to uses which will secure the devolution or create the estates desired to be created.

A declaration that personalty shall devolve or pass to persons successively as realty (although in cases of doubtful construction it may help the Court to construe the instrument as creating an imperative trust for conversion) is not, per se, operative, and a bequest of personalty on trust for sale and to hold the net proceeds "upon the trusts and in the manner upon and in which the same would be held and applicable if they had arisen from a sale of" freehold hereditaments by the same will "devised in settlement, under the Settled Land Act, 1882," is not an imperative trust.

Where, therefore, the freeholds referred to had been strictly settled, a person who had become entitled to an estate tail in them was held to have become entitled to the personalty bequeathed without executing a disentailing assurance. *In re* WALKER. MACINTOSH-WALKER *v.* WALKER – – **Parker J. 705**

2. —— *Real Estate—Infant—Sale by Order of Court for Costs—Surplus Proceeds—Realty or Personalty.*

Since the decision in *Steed* v. *Preece*, (1874) L. R. 18 Eq. 192, it is established that an order of the Court rightfully made for the sale of real estate operates as a conversion from the date of the order so that the proceeds of sale are personalty.

CONVERSION—*continued.*

Decision of Eve J., [1908] 1 Ch. 880, reversed.

Scott v. *Scott*, (1882) 9 L. R. Ir. 367, disapproved. BURGESS *v.* BOOTH – **C. A. 648**

—— Interim rents—Tenant for life and remainderman — Postponement of sale
See SETTLED LAND. **74**

—— Partition action—Order for sale—Death of person entitled before sale—Devolution of share – – – – – **638**
See PARTITION.

—— Real estate—Trust for conversion—Failure of objects of trust—Realty or personalty —Estate duty – – – – **675**
See SETTLEMENT.

CONVEYANCING AND LAW OF PROPERTY — Mortgage — Power of sale — Notice requiring payment—Default for three months – – – – – **20**
See MORTGAGE.

COPYRIGHT—*International Copyright—Foreign Musical Composition—Right of Public Performance reserved—Notice in French Language—Copyright (Musical Compositions) Act*, 1882 (45 & 46 *Vict. c.* 40), *s.* 1—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *ss.* 3, 4, 6—*The Berne Convention*, 1887, *Articles* 2, 7, 9—*Copyright (Musical Compositions) Act*, 1888 (51 & 52 *Vict. c.* 17), *s.* 3.

The provision in the Berne Convention, 1887, and the Orders in Council adopting the same, that the enjoyment of the rights thereby given to foreign authors is to be subject to the conditions and formalities prescribed by law in the country of origin of the work, means that it is to be subject only to those conditions and formalities, and not to those required by the law of the country in which the right is being enforced. On the true construction of the Berne Convention, the declaration that public performance of musical works is forbidden, thereby required to be made on the title-page of the work, is sufficient if made in the language of the country of origin. It need not be repeated in the language of the country in which the right is to be enforced. The Copyright (Musical Compositions) Act, 1882, s. 1, does not apply to such a case.

Decision of Neville J., [1908] 1 Ch. 443, reversed on this point. SARPY *v.* HOLLAND
C. A. 198

2. —— *Unpublished Picture—Property in Picture—Common Law Right—Infringement—Pirated Copy—Innocent Publication—Damages.*

Any person who, however innocently, publishes a pirated copy of an unpublished picture, not registered under the Fine Arts Copyright Act, 1862 (25 &'26 Vict. c. 68), is liable to damages for infringement of the owner's common law right of property in the picture.

Decision of Swinfen Eady J., [1908] 1 Ch. 567, affirmed. MANSELL *v.* VALLEY PRINTING COMPANY – – – – – **C. A. 441**

COSTS — Company — Payment by promoter — Liability of company – – **515**
See COMPANY. 3.

—— Compulsory purchase—Money in Court—Payment out—Failure of part of summons—Order to pay interest—Costs of obtaining order – – – – **691**
See PRACTICE. 1.

—— Lands Clauses Act—Sale of leaseholds—Death of vendor before completion—Vendor's will—Costs of probate—Taxation – – – – – **503**
See LANDS CLAUSES ACTS.

—— Motion for judgment against defendant not appearing – – – – **127**
See PATENT. 1.

COVENANT—Not to assign without consent—Power of re-entry on breach—Alienation—Statutory powers—Waterworks company – – – – **214**
See LANDLORD AND TENANT.

—— Restrictive covenants—Building scheme—Rights of purchasers inter se—Reservation to vendor of right to dispense with restrictions – – – – **665**
See VENDOR AND PURCHASER.

CROWN—Crown lands—Grant of foreshore by the Crown—Pier—Unauthorized construction—Public nuisance—Rates for passengers—Rates for vessels "mooring" **460**
See PIER.

CROWN LANDS.
See under CROWN.

CUSTOM—River—Right of public to shoot wild fowl—Birds of warren – – **139**
See FORESHORE.

DAMAGES—Copyright—Unpublished picture—Property in picture—Pirated copy—Innocent publication – – **441**
See COPYRIGHT. 2.

—— Patent—Action for infringement — Judgment for patentee—Order for inquiry as to damages—Estoppel by judgment **430**
See PATENT. 2.

—— Patent—Vendor's lien for unpaid royalties—Breach of contract — Damages — Election – – – – – **127**
See PATENT. 1.

DEATH—Bastardy order—Weekly payment—Death of putative father—Liability of father's estate – – – – **687**
See AFFILIATION.

—— Commission—Personal contract—Death of party—Commission payable "as long as we do business" – – – **370**
See COMMISSION.

—— Costs—Taxation—Sale of leaseholds—Death of vendor before completion—Vendor's will—Costs of probate – – **503**
See LANDS CLAUSES ACTS.

DEATH—*continued.*

—— Partition action—Order for sale—Conversion—Death of person entitled before sale—Devolution of share – – **638**
See PARTITION.

—— Will—Lapse — Death of all beneficiaries and executor before testator—"Intestate" – – – – – **500**
See WILL. 7.

DEATH DUTIES.
See under REVENUE

DEBENTURE-HOLDERS AND DEBENTURES.
See under COMPANY.

DEBENTURES — Will — Bequest of "all my debentures" in a company — Testator holding debentures and debenture stock **493**
See WILL. 3.

DEBTS—Statute-barred debt owing to estate—Residuary legatee of debtor's estate also a legatee of creditor's estate—Bringing into account – – – – **682**
See ADMINISTRATION. 4.

—— Will — Charge of debts and legacies—Implied power to sell or mortgage—Liability of mortgagee to see to application of money– – – – **356**
See WILL. 1.

—— Will—Direction to pay debts out of residue—Colonial death duty – – **365**
See WILL. 4.

DEBTS RECOVERY ACT—Real assets—Alienation by "devisee" — Mortgage — Purchaser—Priority – – – **307**
See ADMINISTRATION. 2.

DEDICATION—Way, Right of—Highway—User by public — Land in settlement—Possibility of dedication – – **586**
See WAY, RIGHT OF.

DESIGNS—Patents– – – – – **487**
See PATENT. 3.

"**DEVISEE**"—Alienation by—Mortgage—Purchaser—Priority – – – **307**
See ADMINISTRATION. 2.

—— Mortgage by devisee to raise legacies—Liability of mortgagee to see to application of money – – – **356**
See WILL. 1.

DIRECTOR—Allotment, proceeding to—Liability of directors—"Knowingly contravene" **240**
See COMPANY. 2.

DIVORCE — Foreign jurisdiction — Putative marriage—Legitimacy of issue—Law of Scotland – – – – – **344**
See MARRIAGE.

DRAINS.
See under SEWERS

DUTY—Public revenue.
See under REVENUE.

EDUCATION—School.
See under SCHOOLS.

ELECTRIC BELL SIGNALS—Postmaster-General—Monopoly—Private lines – – **172**
See TELEGRAPH. 2.

ENDOWED SCHOOL.
See under SCHOOLS.

"EQUITABLE CHARGE"—Real estate—Exoneration—Estate duty – – **340**
See ADMINISTRATION. 3.

EQUITABLE ESTATE — Mortgage of — Real assets—Alienation by "devisee"—Purchaser—Priority – – – **307**
See ADMINISTRATION. 2.

ESTATE DUTY.
See under REVENUE.

ESTOPPEL—Patent—Action for infringement—Judgment for patentee — Subsequent revocation of patent — Estoppel by judgment – – – – – **430**
See PATENT. 2.

EVIDENCE—Company—Winding-up — Sale of undertaking — Dissentient member—Purchase of interest—Right of dissentient member to examine officers prior to arbitration – – – – **450**
See COMPANY. 8.

—— Specific legacy — Misdescription—Shares in a bank—Extrinsic evidence—Admissibility – – – – **111**
See WILL. 8.

EXAMINATION — Company — Winding-up — Sale of undertaking—Dissentient member — Purchase of interest — Right of dissentient member to examine officers prior to arbitration – – – **450**
See COMPANY. 8.

EXECUTION — General testamentary power — Express reference required — General reference to all testamentary powers
See POWER OF APPOINTMENT. **581**

EXECUTOR — Beneficial devise in fee to one executor—Mortgage by devisee to raise legacies—Liability of mortgagee to see to application of money – – **356**
See WILL. 1.

—— Imperfect gift of personalty—Bonds to bearer—Continuing intention to give—Donee appointed one of the executors
See ADMINISTRATION. 1. **251**

—— Will—Immediate gift of share of residue—Right of executors to retain share to answer debt – – – – **69**
See ADMINISTRATION. 5.

EXECUTORY DEVISE—Contingent remainder or—Will—Construction – – **256**
See WILL. 2.

EXONERATION—Real estate—Estate duty—"Equitable charge" – – – **340**
See ADMINISTRATION. 3.

FINANCE ACTS.
See under REVENUE.

FINE ARTS COPYRIGHT.
See under COPYRIGHT.

FISHERY—*Prescription in a que Estate—Profit à prendre in alieno solo—Presumption of Legal Origin.*

A prescription in a que estate for a profit à prendre in alieno solo without stint and for commercial purposes is unknown to the law.

Therefore, where by way of defence to an action of trespass by riparian proprietors, the alleged trespass consisting in fishing in a non-tidal reach of a river of which the plaintiffs claimed to be the owners, the defendants set up a prescriptive right to a free fishery or common of fishery vested in the freehold tenants of a certain manor or hundred whose freeholds were situate in any of the parishes adjoining the river, and proved that they and their predecessors in title as such freeholders in exercise of such alleged right for three centuries past had openly and notoriously fished from boats with nets for salmon and other fish in the portion of the river in question and sold the fish so caught in the market:—

Held, that the Court could not presume a legal origin for the alleged right.

Decision of Neville J., [1908] 1 Ch. 230, reversed. LORD CHESTERFIELD *v.* HARRIS **C. A. 397**

—— Tidal and navigable river—Public rights in sea and foreshore – – – **139**
See FORESHORE.

FORECLOSURE—Mortgage.
See under MORTGAGE.

—— Registered title—Mortgage by deed—Contemporaneous instrument of charge—Order foreclosing mortgage, but not charge – – – – – **169**
See LAND TRANSFER.

FOREIGN JURISDICTION—Divorce—Putative marriage—Legitimacy of issue—Law of Scotland – – – – – **344**
See MARRIAGE.

FOREIGN MUSICAL COMPOSITIONS — Copyright.
See under COPYRIGHT.

FORESHORE — *Tidal and Navigable River — Wild Fowl — Right of Public to shoot Wild Fowl — Custom — Birds of Warren — Public Rights in Sea and Foreshore—Fishery.*

Action brought by the lord of certain manors adjoining the Severn, a tidal and navigable river, for trespass on the foreshore, parcel of the manors, in a boat and on foot, for the purpose of shooting wild duck. Defendant denied that the foreshore was parcel of the manors and, even if it were, he claimed the right to go upon the

FORESHORE—*continued.*

foreshore and shoot and carry away wild duck on the ground of immemorial user, in four alternative ways: (1.) as a member of the public in exercise of a general right of all the King's subjects in and over the foreshore of a tidal navigable river; (2.) as one of the inhabitants of the manors by virtue of a trust or reservation in their favour which the Court would presume to have been created by the original grant of the manors to the plaintiff's predecessors in title; (3.) as an inhabitant of the manors, being a wild-fowler by occupation, by virtue of a custom of the manors; (4.) by prescription as a right in gross enjoyed by him and his ancestors:—

Held, on the evidence, that the plaintiff had proved his title to the foreshore as part of the manors, and also to a several fishery in the Severn. The public have no rights over the foreshore of a tidal navigable river, when not covered by the tide, except such as are ancillary to their rights of fishing and navigation in the sea. When covered by the tide the foreshore is part of the sea, and the only rights of the public in or over it are the rights of navigation and fishing and rights ancillary thereto. The right claimed to kill and carry away wild duck is—whether wild fowl are birds of warren or mere wild birds in which there is no property—a profit à prendre and cannot be claimed by custom, but *semble* wild duck are birds of warren.

Held, also, that there was not sufficient evidence of user to enable the Court to presume the existence of a trust, or to establish a prescriptive right. LORD FITZHARDINGE *v.* PURCELL - - - - - **Parker J. 139**

—— Crown lands—Grant of foreshore by the Crown—Pier—Unauthorized construction—Public nuisance - - **460**
See PIER.

FORFEITURE — Legacy—Codicil — Substituted settled legacy - - - - **507**
See WILL. 5.

FRANCE—Trade mark—Passing off—Secondary meaning of name — "Chartreuse" — French law of associations - - **715**
See TRADE MARK. 1.

FREEHOLDS—Of manor — Heriot — Tenant — "Dying seised"—Mortgagor in possession - - - - - - **10**
See HERIOT.

FUTURITY—Words of — Will — Construction
See WILL. 9—11. **1, 117, 121, n.**

GRAMMAR SCHOOL.
See under SCHOOLS.

GRANT—Crown lands—Grant of foreshore by the Crown—Pier—Unauthorized construction—Public nuisance - - **460**
See PIER.

HERIOT—*Freehold of Manor—Tenant—"Dying seised"—Mortgage—Mortgagor in possession.*

A mortgagor in possession of customary freeholds is not so "seised" thereof that on his death the lord of the manor is entitled to claim his best beast as a heriot, pursuant to the custom of the manor.

Decision of Kekewich J., [1907] 1 Ch. 366, reversed. COPESTAKE *v.* HOPER - **C. A. 10**

HIGHWAY—Way, Right of—User by public—Land in settlement — Possibility of dedication - - - - - **586**
See WAY, RIGHT OF.

INFANT—Real estate—Sale by order of Court for costs—Surplus proceeds—Realty or personalty - - - - **648**
See CONVERSION. 2.

INFRINGEMENT—Copyright.
See under COPYRIGHT.

—— Patent.
See under PATENT.

INJUNCTION—Mines — Overlying and underlying seams of coal—Right to support—Subsidence - - - - **475**
See MINES.

—— Sewage works—Natural stream—Pollution — "Deterioration of the water" — Injunction - - - - **551**
See LOCAL SANITARY AUTHORITY.

—— Sewers—Storm-water overflow—Discharge into tidal navigable creek — Trespass
See LONDON. **526**

INSTALMENTS—Debt due from beneficiary to testator payable by instalments—Right of executors to retain share to answer debt - - - - - - **69**
See ADMINISTRATION. 5.

INTEREST — Company — Debenture-holders' action—Supposed deficient security—Principal and interest—Payments on account — Appropriation of payments
See COMPANY. 4. **652**

INTERNATIONAL COPYRIGHT.
See under COPYRIGHT.

INTERNATIONAL LAW.
See under CONFLICT OF LAWS

INTESTATES' ESTATES—Will—Lapse—Death of all beneficiaries and executor before testator - - - - - **500**
See WILL. 7.

INVESTMENT—Trustee—Investment expressly forbidden - - - - - **248**
See TRUSTEE.

JUDGMENT—Patent—Infringement, Action for—Judgment for patentee—Damages—Subsequent revocation of patent — Estoppel by judgment - - **430**
See PATENT. 2.

JURISDICTION—Company — Memorandum of association—Alteration — Fundamental objects—Abandonment — Confirmation by Court – – – – – **287**
See COMPANY. 6.

—— Divorce — Foreign jurisdiction — Putative marriage—Legitimacy of issue—Law of Scotland – – – – – **344**
See MARRIAGE.

—— Money-lenders.
See under MONEY-LENDER.

—— Trade union.
See under TRADE UNION.

LAND TRANSFER—*Registered Title—Mortgage by Deed—Contemporaneous Instrument of Charge—Order foreclosing Mortgage, but not Charge—Rectification of Register—Form of Order—Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 95.

Form of order under s. 95 of the Land Transfer Act, 1875, rectifying the register in a case where a foreclosure order had foreclosed a mortgage by deed of registered land without foreclosing the contemporaneous instrument of charge. WEYMOUTH *v.* DAVIS
Swinfen Eady J. 169

LANDLORD AND TENANT—*Covenant not to assign without Consent—Power of Re-entry on Breach—Alienation—Statutory Powers—Waterworks Company—Metropolitan Water Board—Transfer of Undertaking—Leasehold Premises—Statutory Vesting—Metropolis Water Act*, 1902 (2 *Edw.* 7, *c.* 41), *s.* 2, *sub-s.* 1 ; *s.* 24, *sub-ss.* 1 *and* 2 ; *s.* 37 — *Metropolitan Water Board (Various Powers) Act*, 1907 (7 *Edw.* 7, *c. clxxiv.*), *s.* 53.

By virtue of the provisions of the Metropolis Water Act, 1902, the undertaking and property of the Grand Junction Waterworks Company, comprising (inter alia) leasehold premises demised to the company by a lease of March 14, 1881, were transferred to and became vested in the plaintiff Board. The lease contained a covenant on the part of the company, its successors and assigns, not to sell, assign, or underlet the demised premises without the previous written consent of the lessors, and also a power for the lessors to re-enter on breach of any of the lessees' covenants. The plaintiff Board did not require the premises in question, and proposed to underlet them to an intended tenant for the residue of their term less three days. The defendants, in whom the leasehold reversion was vested, refused their consent. In an action by the plaintiff Board for a declaration that, notwithstanding the covenant, they were entitled, in exercise of their powers under the Metropolis Water Act, 1902, and the provisions of the Public Health Act, 1875, incorported therein, and the Metropolitan Water Board (Various Powers) Act, 1907, to sell, assign, or underlet the premises without the previous consent in writing of the defendants :—

Held, that what the plaintiff Board possessed was not an absolute term of years, but only a lease liable to be determined in the event (inter alia) of an assignment or underletting without the previous written consent of the defendants ; that the plaintiff Board's statutory powers only enabled it to dispose of such estate and interest as it might have, and did not deprive the defendants of their right to re-enter for breach of the covenant against assigning or underletting without the necessary consent ; and that, consequently, the action failed. METROPOLITAN WATER BOARD *v.* SOLOMON – **Joyce J. 214**

LANDS CLAUSES ACTS — *Costs — Taxation — Sale of Leaseholds — Death of Vendor before Completion — Vendor's Will — Costs of Probate — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 82.

Where an owner of leasehold property entered into a contract under the Lands Clauses Consolidation Act to sell the same to the London County Council, and died before the sale was completed, having by his will left all his property to his wife and appointed her his sole executrix :—

Held, that the costs of taking out probate to the vendor's will did not come within s. 82 of the Act, and were therefore not payable by the county council. *In re* ELEMENTARY EDUCATION ACTS, 1870 AND 1873 – **Joyce J. 503**

—— Costs — Compulsory purchase — Money in Court — Payment out—Failure of part of summons—Order to pay interest—Costs of obtaining order – – **691**
See PRACTICE.

LAPSE—Will—Death of all beneficiaries and executor before testator—"Intestate"
See WILL. 7. **500**

LEASEHOLDS — Sale of — Costs — Taxation—Death of vendor before completion—Vendor's will—Costs of probate – **503**
See LANDS CLAUSES ACTS.

—— Transvaal leaseholds—Enjoyment in specie — Roman-Dutch law — English will – – – – – – **235**
See CONFLICT OF LAWS.

LEGACY—Will—Construction.
See under WILL.

LEGITIMACY—Divorce — Foreign jurisdiction —Putative marriage—Legitimacy of issue—Law of Scotland – – **344**
See MARRIAGE.

LIEN — Patent — Vendor's lien for unpaid royalties—Breach of contract – **127**
See PATENT. 1.

LIMITATIONS, STATUTE OF—Statute-barred debt owing to estate — Residuary legatee of debtor's estate also a legatee of creditor's estate — Bringing into account – – – – – **682**
See ADMINISTRATION. 4.

LOCAL GOVERNMENT—Rates.
See under RATES.

—— Schools.
See under SCHOOLS.

LOCAL SANITARY AUTHORITY — *Natural Stream—Pollution—Sewage Works—"Deterioration of the Water"—Injunction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 17.

According to the true construction of s. 17 of the Public Health Act, 1875, the water in a natural stream, the quality and purity of which is alleged to have been deteriorated by an effluent from a sewage farm, is not water of an arbitrary standard of purity and quality, but the actual water of the stream itself, into which the sewage or filthy water is conveyed.

Where a drainage board conveyed into an already polluted stream, at certain points, water "not freed from all excrementitious or other foul or noxious matter," and thus affected so as to deteriorate the purity and quality of the water of the stream at the points where such effluents were discharged :—

Held, that an injunction must be granted, at the instance of the Attorney-General, in the terms of s. 17 of the Public Health Act, 1875, to restrain such pollution.

It was the intention of the Legislature to provide that at no one point in the stream should offending liquor be conveyed into it, and it is no answer on the part of a drainage board to say that by discharging elsewhere into a polluted stream better effluents they have improved the quality of the water as a whole. ATTORNEY-GENERAL *v.* BIRMINGHAM, TAME, AND REA DISTRICT DRAINAGE BOARD
Kekewich J. 551

LONDON — *Main Drainage System — Sewers — Storm-water Overflow — Discharge into Tidal Navigable Creek — Riparian Owners — Interference with private Rights—Trespass—Nuisance —Injunction—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 150, 151—*Metropolis Management Amendment Act*, 1858 (21 & 22 *Vict. c.* 104), *ss.* 1, 2, 23, 24, 31.

The plaintiff company owned large manufacturing works on both sides of a navigable tidal creek forming part of the Thames within the metropolis, and also the bed and banks of the creek subject to the public right of navigation therein. By the Metropolis Management Act, 1855, a brook which discharged into the creek and which had become an open sewer was with other sewers vested in the Metropolitan Board of Works, the predecessors in title of the defendants, with power to alter, divert, or discontinue such sewers when necessary. By that Act and the Metropolis Management Amendment Act, 1858, the board were authorised and required to construct, according to such plans as should to them seem proper, all necessary sewers and works for the improvement of the main drainage of the metropolis and for preventing as far as practicable the sewage of the metropolis from passing into the river within the metropolis; but they were to cause the authorized works to be constructed and kept, and to exercise their powers of disposing of the sewage, so as not to create a nuisance. Under these Acts a vast system of sewers was constructed so as to carry the sewage down the Thames beyond the limits of the metropolis, and the brook in question was culverted and connected with a low level sewer so

LONDON—*continued.*

that it no longer discharged into the creek. In 1907 the defendants, as part of the main drainage system and to relieve the pressure in the low level sewer in times of heavy rains, erected a pumping station at the mouth of the creek, and when occasion required pumped the storm overflow into the creek. The storm-water was heavily charged with sewage matter, which adhered to the banks of the creek and created a nuisance:—

Held, that the defendants could not justify their acts on the plea that they were carrying out their statutory obligations, and that the plaintiffs were entitled to an injunction both on the ground of nuisance and (Kennedy L.J. doubting) on the ground of trespass.

Dixon v. *Metropolitan Board of Works*, (1881) 7 Q. B. D. 418, distinguished. PRICE'S PATENT CANDLE COMPANY *v.* LONDON COUNTY COUNCIL
C. A. 526

—— Burial ground—Vested in rector and churchwardens—Closed by Order in Council—London Government Act, 1899 – **600**
See BURIAL.

—— Waterworks company—Covenant not to assign without consent—Power of re-entry on breach—Alienation—Statutory powers – – – – – **214**
See LANDLORD AND TENANT.

MANDAMUS—Rates, Judgment for arrears of—Retrospective rate—Discretion – **321**
See RATES.

MANOR—Heriot—Freehold of manor—Tenant—"Dying seised"—Mortgagor in possession – – – – – **10**
See HERIOT.

MARRIAGE—*Divorce—Foreign Jurisdiction—Putative Marriage—Legitimacy of Issue—Law of Scotland—Good Faith of Spouses — Error in Fact—Error in Law.*

S., whose domicil of origin was Scottish, went in or about 1880 to Canada, where he married a wife in 1883. He lived with her there until the beginning of 1895. She then left him and joined W., with whom she had previously committed adultery. S. then went into North Dakota and, after a nominal residence of ninety days, procured a divorce, which was admittedly invalid according to the laws of Scotland or Canada, because S. was not truly domiciled in North Dakota. Adultery was not alleged in the divorce proceedings, and the divorce was granted on grounds which would not be held sufficient in Scotland or in Canada. Soon after the divorce W. and the divorced wife of S. went through the form of marriage in San Francisco. The defendant was the only child of this marriage. If legitimate, he was entitled, as heir in tail male of the father of W., to certain lands in Scotland and to certain stocks in English railways held upon trust for the persons entitled to the lands. The plaintiff, the next tenant in tail in remainder, brought this action for a declaration that the defendant was illegitimate, and that the plaintiff was entitled to the income of the

MARRIAGE—*continued.*

investments other than the lands. The defence was that the defendant was legitimate by virtue of the doctrine of the canon law as to putative marriage, namely, that the children of an invalid marriage will be legitimate if the spouses, or one of them, have entered into the marriage bona fide and in ignorance of the impediment. There was conflicting evidence on the question whether this doctrine of putative marriage was part of the law of Scotland or not, but it was admitted that, if it was, the ignorance of the spouse must be founded on an error of fact and not an error of law. The ignorance alleged in this case was that the spouses did not know that the North Dakota divorce would not be recognized in Scotland.

The judge refused to decide the first point, but held that the ignorance alleged was an error of law and not an error of fact, whether the domicil of W. at the date of the marriage was Scottish or Canadian. The defendant was therefore illegitimate, even if the doctrine of putative marriage was part of the law of Scotland. The declaration asked for was made.

Semble, a divorce granted by a foreign Court having full jurisdiction on grounds not recognized as sufficient by the law of Scotland will not be recognized by the Scottish Courts. *In re* STIRLING. STIRLING *v.* STIRLING
Swinfen Eady J. 344

MEMORANDUM OF ASSOCIATION—Alteration —Fundamental objects—Abandonment —Confirmation by Court—Jurisdiction
See COMPANY. 6. **287**

MAXIM—Profit à prendre in alieno solo - **397**
See FISHERY.

METROPOLIS.
See under LONDON.

MINES — *Overlying and Underlying Seams of Coal—Right to Support—Subsidence—Injunction.*

In 1887 the Duke of Portland granted the plaintiffs a long lease of the seam of coal nearest to the surface of and underlying a large area of land, with usual powers to work and carry away the coal. The lease provided that it should be lawful for the Duke and his assigns to enter upon the mining area of the plaintiffs and to sink to and work the mines underlying the plaintiffs' mine, and that in such case they should indemnify the plaintiffs against any physical damage that might be caused by the operations of the tenants of the underlying mines to the mine or mining apparatus of the plaintiffs. In 1893 the Duke granted the defendants a lease of the uppermost seam of coal underlying the plaintiffs' seam, with usual powers to sink to, work, and carry away the coal. The defendants' seam was 170 yards below the plaintiffs' seam. The defendants worked their seam in a reasonable and proper manner, and the necessary and inevitable result of their working was to let down the plaintiffs' seam and render it more difficult to work. In an action by the plaintiffs to restrain the defendants from so

MINES—*continued.*

working their seam as to cause subsidence in the plaintiffs' seam :—

Held, that the proviso in the plaintiffs' lease did not expressly or by necessary implication reserve to the Duke and his assigns the right to withdraw support from the plaintiffs' seam, and that the plaintiffs were entitled to an injunction.

The principle of *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, applied. BUTTERLEY COMPANY *v.* NEW HUCKNALL COLLIERY COMPANY
Neville J. 475

MISDESCRIPTION—Specific legacy—Shares in a bank—Absorption by another bank—Extrinsic evidence - - - **111**
See WILL. 8.

MISTAKE — Will — Inaccurate enumeration — Class - - - - - **190**
See WILL. 6.

MONEY-LENDER—*Registration—Mortgage in unregistered Name — Invalidity — Declaratory Order—Jurisdiction—No Claim for ancillary Relief — Imposition of Terms — Waiver of Illegality—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*a*), (*b*), (*c*)—*Rules of the Supreme Court*, 1883, *Order* XXV., *r.* 5.

In an action by the trustee of a debtor under a scheme of arrangement with his creditors against an unregistered money-lender, who had taken a mortgage from the debtor to secure a loan, the Court will make a mere declaratory order that the mortgage is illegal and void under s. 2 of the Money-lenders Act, 1900, although no ancillary relief is asked.

In such a case the Court will not impose upon the plaintiff equitable terms as to repayment of the actual money advanced as a condition of making the declaratory order.

Lodge v. *National Union Investment Co.*, [1907] 1 Ch. 300, distinguished.

Quære whether a statutory illegality can be waived. CHAPMAN *v.* MICHAELSON **Eve J. 612**

"**MOORING**"—Pier—Unauthorized construction —Public nuisance—Rates for passengers —Rates for vessels "mooring" - **460**
See PIER.

MORTGAGE—*Power of Sale—Notice requiring Payment—Default for Three Months—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 20.

A notice served by a mortgagee upon a mortgagor, after the mortgage money has become payable, requiring payment at the expiration of three months from the date of the notice, is a good notice under s. 20 of the Conveyancing Act, 1881. The three months' default in payment mentioned in that section begins to run from the service of such a notice, not from the date fixed by the notice for payment.

Selwyn v. *Garfit*, (1888) 38 Ch. D. 273, distinguished. BARKER *v.* ILLINGWORTH
Swinfen Eady J. 20

—— Debenture stock—Covering deed—Specific ships—Specific ancillary mortgages—

MORTGAGE—*continued.*

Substituted security—Registration **564**
See COMPANY. 5.

—— Heriot—Freehold of manor—Tenant—"Dying seised"—Mortgagor in possession – – – – – – **10**
See HERIOT.

—— Land Transfer Act—Registered title—Mortgage by deed—Contemporaneous instrument of charge—Order foreclosing mortgage, but not charge – – **169**
See LAND TRANSFER.

—— Money-lender—Registration—Waiver of illegality – – – – – **612**
See MONEY-LENDER.

—— Real assets—Alienation by "devisee"—Mortgage of equitable estate—Purchaser—Priority – – – – – **307**
See ADMINISTRATION. 2.

—— Will—Charge of debts and legacies—Liability of mortgagee to see to application of money – – – – **356**
See WILL. 1.

MUSICAL COMPOSITIONS—Copyright.
See under COPYRIGHT.

NAME—Trade mark—Passing off—Secondary meaning of name—"Chartreuse"—French law of associations – – **715**
See TRADE MARK. 1.

NOTICE — Company — Allotment — Notice of avoidance within one month of statutory meeting – – – – **228**
See COMPANY. 1.

—— Mortgage—Power of sale—Notice requiring payment—Default for three months
See MORTGAGE. **20**

—— Third party notice—Leave to issue—Service on plaintiff—Ex parte application – **224**
See PRACTICE. 2.

NUISANCE — Pier—Unauthorized construction—Public nuisance—Rates for passengers—Rates for vessels "mooring" – **460**
See PIER.

—— Sewers—Storm-water overflow—Discharge into tidal navigable creek—Trespass—Injunction – – – – **526**
See LONDON.

PARTICULARS OF OBJECTIONS — Patent—Petition for prolongation – – **487**
See PATENT. 3.

PARTITION—*Partition Action—Order for Sale—Conversion—Death of Person entitled before Sale—Devolution of Share.*

An order for sale properly made in a partition action operates as a conversion of the share of a person sui juris as from the date of the order, and, therefore, on the death before sale of the

PARTITION—*continued.*

person entitled, his share of the unsold real estate will devolve as personalty. *In re* DODSON. YATES *v.* MORTON – – **Eve J. 638**

PASSENGERS—Pier—Unauthorized construction — Public nuisance — Rates for passengers – – – – **460**
See PIER.

PATENT—*Contract for Sale—Consideration, in part Royalties—Assignment of Patent—Sub-sale—Vendor's Lien for Unpaid Royalties—Breach of Contract — Damages — Election — Bankruptcy of Defendant—Motion for Judgment against Defendant not appearing — Costs — Practice.*

In 1904 the plaintiffs agreed to sell S. some patents, and, as the consideration for the sale, S. agreed to pay them a sum of 5000*l.* cash and certain royalties, and S. also guaranteed the payment of certain annual sums by way of minimum royalties during the continuance of the patents, the first payment to be made in June, 1906, and if default were made in payment of any minimum royalty the whole of the minimum royalties were to become immediately payable. S. paid the 5000*l.*, and the plaintiffs by two deeds in common form assigned the patents to him for a nominal consideration and without reference to the agreement or any reservation of royalties. In 1905 S. sold and assigned the patents for value to a company with notice of the agreement of 1904, and the company paid the plaintiffs the minimum royalty that fell due in June, 1906. Subsequently S. wrongfully repudiated the agreement of 1904, and the plaintiffs brought an action against him and the company, alleging that S. by his wrongful repudiation had committed a breach of the agreement which entitled them "to treat it as at an end and to sue him in damages for the breach," and claiming, as against S., the total sum of the unpaid minimum royalties by way of damages for the breach, and, as against the company, a lien on the patents for the royalties as unpaid purchase-money. Subsequently S. became bankrupt, and his trustee in bankruptcy was added as a defendant but declined to take any part in the action. The company pleaded that the plaintiffs, having elected to treat the agreement as at an end, had no claim for royalties thereunder against them:—

Held, that the plaintiffs had not by their pleadings irrevocably elected to rescind the agreement, but could not sue both in damages for the breach and also for the consideration.

Held, also, following *Werderman* v. *Société Générale d'Électricité*, (1881) 19 Ch. D. 246, as explained in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, that the plaintiffs had a vendor's lien on the patents in the hands of the company for the unpaid minimum royalties.

Held, also, that the plaintiffs were entitled, as against S., to an account of the royalties payable under the agreement of 1904 and to prove in his bankruptcy for the amount found due on the account.

PATENT—*continued.*

Form of order as to costs when an action comes on for trial against one defendant, and on motion for judgment against another defendant who has not appeared to the writ or does not appear at the trial, and the plaintiff recovers judgment against both with costs. DANSK REKYLRIFFEL SYNDIKAT AKTIESELSKAB *v.* SNELL – – – – – **Neville J. 127**

2. —— *Infringement, Action for—Judgment for Patentee—Order for Inquiry as to Damages—Subsequent Revocation of Patent—Estoppel by Judgment.*

A patentee brought an action for infringement of the patent. The defendants set up by way of defence that the patent was invalid on the ground of user prior to the grant of the patent. That defence failed, and the plaintiff at the trial obtained judgment for an injunction, and an order for an inquiry as to damages. Pending the inquiry, the defendants, having discovered further instances of prior user, petitioned for revocation of the patent, and obtained an order for its revocation :—

Held (affirming the judgment of Parker J.) that, for the purposes of the inquiry as to damages, the defendants were estopped by the judgment in the action from alleging that the patent was invalid, and therefore the plaintiff was entitled to substantial damages, notwithstanding the revocation of the patent. POULTON *v.* ADJUSTABLE COVER AND BOILER BLOCK COMPANY – – – – – **C. A. 430**

3. —— *Prolongation, Petition for — Particulars of Objections—Patents and Designs Act*, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18 — *Rules of the Supreme Court* (*Patents and Designs*), 1908 (*Order* LIII*a.*), *rr.* 3, 17.

Rule 3 of the Rules of the Supreme Court (Patents and Designs), 1908 (Order LIII*a.*), forms in itself, taken in connection with the Rules of the Supreme Court which are made applicable, a code by which all questions of practice relating to petitions for the extension of patents are to be governed, and the subsequent rules of the order as to particulars in cases of petitions for revocation and actions for infringement are governed by different considerations.

Rule 3 (*l*) gives the Court considerable latitude as to what particulars of objections to a prolongation should be given, and the considerations which apply are those which apply to pleadings generally. But the objector should at the earliest stage possible give the petitioner particulars of what he relies on as preventing the patent from being novel or from having subject-matter, including a concise statement of what he knows as to any literature, specifications, and the like documents relied on. *In re* JOHNSON'S PATENT – – **Parker J. 487**

PAYMENT — Notice requiring — Mortgage — Power of sale — Default for three months – – – – – **20**
See MORTGAGE.

PERSONALTY—Realty or—Conversion.
See under CONVERSION.

PETITIONS—Patents.
See under PATENT.

PICTURE—Copyright—Unpublished picture—Property in picture—Infringement—Pirated copy—Innocent publication—Damages – – – – – **441**
See COPYRIGHT. 2.

PIER — *Unauthorized Construction — Public Nuisance—Rates for Passengers—Rates for Vessels "mooring"—Recovery of Rates paid under Protest—Harbours, Docks, and Piers Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 27), *ss.* 2, 25, 33, 47—*General Pier and Harbour Act*, 1862 (25 *&* 26 *Vict. c.* 19), *ss.* 6, 13, 17, 19—*Grant of Foreshore by the Crown—Crown Lands Act*, 1829 (10 *Geo.* 4, *c.* 50), *s.* 73—*Crown Lands Act*, 1866 (29 *&* 30 *Vict. c.* 62), *s.* 20.

A provisional order of the Board of Trade, confirmed by a special Act of Parliament, authorized a company to construct a pier, and provided that, when a certificate of the due construction of the pier had been given by the Board of Trade, the company might levy certain rates on passengers using the pier and on vessels "mooring" within the limits defined by the order. In 1900 H., who had acquired the pier from the assigns of the liquidator of the company, discovered that the pier had not been constructed in accordance with the provisional order and that the certificate of the Board of Trade had not been given, and thereupon, with the view of perfecting his title, he obtained from the Crown, under the powers of the Crown Lands Act, 1829, a grant of the foreshore and bed of the sea on which the pier stood. In 1907 the plaintiffs ran passenger steamers to the pier, and the M. company, to whom H. had leased the pier, refused to allow the plaintiffs' steamers to come alongside the pier except on payment of a certain lump sum for the season for passenger rates and also "mooring" rates. In an action by the plaintiffs for an injunction to restrain the M. company and H. from excluding them and their passengers from using the pier, and for repayment of rates paid under protest, on the ground that the defendants were not the lawful owners of the pier and that the rates had been illegally demanded :—

Held, that the pier, being an unauthorized structure, was an obstruction to navigation and a public nuisance, and consequently no statutory rights arose in favour of either the defendants or the public.

Held, also, that the plaintiffs, as individual members of the public, could not elect whether they would treat the pier as a nuisance or adopt it as an authorized undertaking.

Held, also, that as the pier was the property of the defendants they could exclude the plaintiffs from it although it was a nuisance : *Dimes* v. *Petley*, (1850) 15 Q. B. 276.

Held, also, that the plaintiffs could not recover rates they had paid under protest because they had received the consideration for such payment.

Held, also, that vessels coming alongside and making fast to the pier merely to land and embark passengers were not "mooring" within the meaning of the provisional order.

PIER—*continued.*

Quære, whether the grant by the Crown to H. of the foreshore and bed of the river was valid. LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY *v.* MERSEY TRADING COMPANY **Neville J. 460**

POLLUTION—Water.
See under LOCAL SANITARY AUTHORITY. LONDON.

POSTMASTER-GENERAL—Monopoly—Private lines—Electric bell signals – – **172**
See TELEGRAPH. 2.

POWER OF APPOINTMENT — *Execution — General Testamentary Power—Express Reference required—General Reference to all Testamentary Powers.*

A fund was settled in trust for such persons as the settlor should by will "expressly referring to this power" appoint.

By her will the settlor gave and devised the residue of her estate, both real and personal, of which she should die possessed or entitled to "and over which I shall have any power of disposition by will" to certain beneficiaries:—

Held, that this was a sufficient reference to execute the power.

In re Waterhouse, (1907) 96 L. T. 688; 98 L. T. 30, and *In re Rolt*, [1908] W. N. 76, applied.

Phillips v. *Cayley*, (1889) 43 Ch. D. 222, and *In re Teape's Trusts*, (1873) L. R. 16 Eq. 442, distinguished. *In re* LANE. BELLI *v.* LANE **Swinfen Eady J. 581**

POWER OF SALE—Mortgage—Notice requiring payment—Default for three months **20**
See MORTGAGE.

POWERS—Lands Clauses Acts.
See under LANDS CLAUSES ACTS.

—— Railway company—Compulsory powers—Powers exercisable for limited period—Expiration of time allowed—Power to construct railway – – – **644**
See RAILWAY.

PRACTICE — *Costs — Compulsory Purchase — Money in Court—Payment out—Failure of Part of Summons—Order to pay Interest—Costs of obtaining Order — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 76, 80.

By an originating summons issued in respect of a fund in Court, which represented the purchase-money of houses which had been taken compulsorily, the plaintiffs asked for inquiries as to children, a declaration on the construction of a will, payment out of the fund in accordance with the result of the inquiries and declaration, and that the costs might be paid by the promoters of the undertaking. An order was made to the effect that a sum representing interest should be paid to the plaintiffs, and that the promoters should pay to the plaintiffs and another respondent "their costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order and of all proceedings relating thereto":—

Held, that the costs payable by the promoters

PRACTICE—*continued.*

did not include all the costs incurred in connection with the parts of the summons which had failed, but must be confined to the costs of obtaining the particular order which was made. *In re* JACOBS. BALDWIN *v.* PESCOTT **Warrington J. 691**

2. —— *Third Party Notice—Leave to issue—Service on Plaintiff—Ex parte Application—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 48.

An application in the Chancery Division for leave to issue and serve a third party notice under Order XVI., r. 48, need not be served on the plaintiff in the first instance, but may be made ex parte.

It is always competent to the Court or judge to require the plaintiff or any other person to be served with the application.

Wye Valley Ry. Co. v. *Hawes*, (1880) 16 Ch. D. 489, commented upon. FURNESS, WITHY & CO., LIMITED *v.* PICKERING – **Joyce J. 224**

—— Action, Cause of—Issue of writ—Company — Debenture — Floating security — Jeopardy—Receiver – – – **62**
See COMPANY. 7.

—— Pleadings — Patent — Vendor's lien for unpaid royalties—Damages — Election
See PATENT. 1. **127**

PRESCRIPTION—In a que estate—Profit à prendre in alieno solo—Presumption of legal origin – – – – **397**
See FISHERY.

PRESUMPTION—Prescription in a que estate—Profit à prendre in alieno solo—Presumption of legal origin – – **397**
See FISHERY.

—— Way, Right of—Possibility of dedication—Land in settlement—Acquiescence **586**
See WAY, RIGHT OF.

PRIORITY—Alienation by "devisee"—Mortgage of equitable estate—Purchaser for value without notice – – – **307**
See ADMINISTRATION. 2.

PRIVATE INTERNATIONAL LAW.
See under CONFLICT OF LAWS.

PROBATE—Costs of—Sale of leaseholds—Death of vendor before completion—Vendor's will—Costs—Taxation – – **503**
See LANDS CLAUSES ACTS.

—— Victoria Administration and Probate Act—Colonial death duty – – – **365**
See WILL. 4.

PROFIT À PRENDRE IN ALIENO SOLO—Prescription in a que estate—Presumption of legal origin – – – – **397**
See FISHERY.

PROLONGATION—Petition for—Patent—Particulars of objections – – – **487**
See PATENT. 3.

PROMOTER—Company — Preliminary expenses —Registration fees — Stamp duty on capital—Payment by promoter – **515**
See COMPANY. 3.

PUBLIC HEALTH—Natural stream—Pollution —Sewage works—"Deterioration of the water"—Injunction – – – **551**
See LOCAL SANITARY AUTHORITY.

—— Rates.
See under RATES.

—— Sewers.
See under SEWERS.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY—*Compulsory Powers—Powers exercisable for limited Period—Expiration of Time allowed—Company in lawful Possession of Land —Power to construct Railway thereon—Ultra vires.*

In an Act of Parliament authorizing a company to construct a railway a section which provides that if the railway be not completed within five years from the passing of the Act, then, on the expiration of that period, the powers by the Act given to the company for making and completing the railway are to cease, only applies to powers which the company could not exercise except by virtue of the Act. If the company have, before the expiration of the five years, lawfully acquired the right to use the land, and if they are incorporated for the purpose of making the railway, they can make it under their common law powers notwithstanding the expiration of the five years.

Decision of Warrington J., [1908] 2 Ch. 455, affirmed on this point.

Decision on the main question of construction overruled. GREAT WESTERN RAILWAY COMPANY *v.* MIDLAND RAILWAY COMPANY **C. A. 644**

—— Telephone—Bridge carrying public road over railway—Power to lay cable along bridge—Consent of railway company
See TELEGRAPH. 1. **514**

RATES—*Judgment for Arrears of Rates—Retrospective Rate—Mandamus—Discretion—Local Government — Rural Authority — Construction of Sewers — "Special Expenses"—Contributory Area—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 28, 229, 230.

Special expenses for drainage works were incurred by the plaintiffs upon terms the result of which was that money was due each year from the defendants to the plaintiffs, and the amount so due was recoverable by the defendants from three contributory parishes for whose benefit the special expenses were incurred. By mistake the plaintiffs did not for several years call upon the defendants to pay the full amount properly due, and less was paid till September, 1904. In April, 1905, the plaintiffs drew attention to the mistake and called upon the defendants to pay the balance due in respect of several previous years up to September, 1904,

RATES—*continued.*

and to make payment for the future on a proper footing. The defendants paid on the lower scale till September, 1905, and thenceforward paid in full. They were unable to recover part of the arrears from the contributory parishes and declined to pay the arrears; whereupon the plaintiffs brought an action to recover the arrears and for a mandamus to enforce the levy of a rate to satisfy them. The defendants admitted that the plaintiffs were entitled to judgment for the arrears, but contended that a mandamus to enforce payment of a retrospective rate would be illegal :—

Held (varying the order of Neville J., [1908] 1 Ch. 222), that the Court had a discretion to grant a mandamus for enforcing the levying of a rate to meet obligations for special expenses of former years if the circumstances justified it; that there was no reason for granting a mandamus to enforce payment of the arrears up to 1904; but that, inasmuch as a demand was made and might have been complied with in the course of the current year 1904-5, a mandamus ought to be granted to enforce payment of the amount due for that period. CROYDON CORPORATION *v.* CROYDON RURAL DISTRICT COUNCIL – – – – – **C. A. 321**

—— Pier—Unauthorized construction—Public nuisance—Rates for passengers—Rates for vessels "mooring" – – **460**
See PIER.

REAL ESTATE—Administration.
See under ADMINISTRATION.

REAL ESTATE CHARGES ACTS – – **340**
See ADMINISTRATION. 3.

REALTY—Personalty or—Conversion.
See under CONVERSION.

RECEIVER—Company — Debenture — Floating security—Jeopardy—Cause of action—Issue of writ – – – – **62**
See COMPANY. 7.

RECTIFICATION—Register—Land transfer **169**
See LAND TRANSFER.

—— Register—Trade mark.
See under TRADE MARK.

RE-ENTRY—Covenant not to assign without consent—Power of re-entry on breach —Statutory powers—Waterworks company – – – – – **214**
See LANDLORD AND TENANT.

REFERENCE—Power of appointment.
See under POWER OF APPOINTMENT.

REGISTER—Rectification—Land transfer **169**
See LAND TRANSFER.

—— Rectification—Trade Mark.
See under TRADE MARK.

REGISTRATION—Company — Debenture stock —Mortgages – – – – **564**
See COMPANY. 5.

REGISTRATION—*continued.*

—— Land Transfer.
See under LAND TRANSFER.

—— Money-lender.
See under MONEY-LENDER.

—— Trade Mark.
See under TRADE MARK.

REMAINDERMAN—Tenant for life and.
See under SETTLED LAND.

RENTS—Interim rents—Tenant for life and remainderman—Conversion—Postponement of sale – – – – **74**
See SETTLED LAND.

RESIDUE—Will—Construction.
See under WILL.

RESTRICTIVE COVENANTS.
See under COVENANT.

RETAINER—Will—Immediate gift of share of residue—Right of executors to retain share to answer debt – – – **69**
See ADMINISTRATION. 5.

REVENUE—Colonial death duty—"Debts"—Victoria Administration and Probate Act – – – – – – **365**
See WILL. 4.

—— Estate duty—Real estate—Exoneration—"Equitable charge" – – – **340**
See ADMINISTRATION. 3.

—— Estate duty—Real estate—Trust for conversion—Failure of objects of trust—Realty or personalty – – – **675**
See SETTLEMENT.

—— Stamp duty — Company — Preliminary expenses — Registration fees — Stamp duty on capital—Payment by promoter – – – – – **515**
See COMPANY. 3.

REVOCATION—Patent.
See under PATENT.

RIPARIAN OWNERS — Sewers — Storm-water overflow — Discharge into tidal navigable creek—Injunction – – **526**
See LONDON.

RIVER—Fishery.
See under FISHERY.

—— Foreshore.
See under FORESHORE.

ROMAN-DUTCH LAW—Transvaal leaseholds—Enjoyment in specie—English will
See CONFLICT OF LAWS. **235**

ROYALTIES—Patent—Vendor's lien for unpaid royalties—Motion for judgment against defendant not appearing—Costs – **127**
See PATENT. 1.

RULES OF SUPREME COURT, Order XVI. (Parties), r. 48 – – – – **224**
See PRACTICE. 2.

—— **Order XXV. (Proceedings in Lieu of Demurrer), r. 5** – – – **612**
See MONEY-LENDER.

—— **Order LIII*a*. (Patents and Designs), 1908, rr. 3, 17** – – – – – **487**
See PATENT. 3.

SALE—Conversion.
See under CONVERSION.

—— Partition action—Order for sale—Conversion—Death of person entitled before sale—Devolution of share – – **638**
See PARTITION.

—— Power of sale.
See under POWER OF SALE.

—— Tenant for life and remainderman—Will—Conversion—Postponement of sale—Interim rents – – – – **74**
See SETTLED LAND.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

SCHOOLS—*Endowed Schools—Grammar School—Scheme of Endowed Schools Commissioners—Alteration of—Jurisdiction of Board of Education—Due regard to Educational Interests of Privileged Class — Public Notice — Notice to Councils of Parishes affected—Modification of Draft Scheme—Necessity for further Notice—Discretion of Board of Education—Charitable Trusts Act*, 1860 (23 *&* 24 *Vict. c.* 136), *s.* 6—*Endowed Schools Act*, 1869 (32 *&* 33 *Vict. c.* 56), *ss.* 11, 28, 45—*Charitable Trusts Act*, 1869 (32 *&* 33 *Vict. c.* 110), *s.* 7—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 14, *sub-s.* 5—*Board of Education Act*, 1899 (62 *&* 63 *Vict. c.* 33)—*Board of Education (Powers) Orders in Council*, 1900–1902.

The B. Grammar School was an ancient foundation and had been regulated from time to time by schemes settled by the Court of Chancery which conferred certain educational privileges on the inhabitants of the parishes of B. & N.

In 1877 the Endowed Schools Commissioners made a scheme for the regulation of the school which as altered by a scheme made in 1903 by the Board of Education, who had succeeded to the powers of the Charity Commissioners, preserved the educational privileges of the inhabitants by providing that the tuition fees should in the case of boys whose parents were resident in one or other of the parishes of B. and N. be reduced by one-third.

In 1905 the Board of Education, under s. 6 of the Charitable Trusts Act, 1860, gave public notice of a proposal by them to make a new scheme, and under s. 14, sub-s. 5, of the Local Government Act, 1894, sent a draft of the proposed scheme to the parish councils of B. and N. The draft scheme preserved the privilege of the inhabitants of B. and N. to a remission of

SCHOOLS—*continued.*

one-third of the tuition fees, but made it a condition that the parents to be entitled to receive it must have resided seven years in one or other of the parishes. The scheme was objected to by the parish councils and by the governors of the school, and for a time remained in abeyance.

In 1907, without giving any further notice either under the Charitable Trusts Act, 1860, or the Local Government Act, 1894, the Board sealed a modified scheme. The scheme as modified abolished the privilege of the inhabitants of B. and N. to a remission of one-third of the tuition fees, but substituted therefor (1.) a provision giving a preference as to admission to the school to the children of the inhabitants of B. and N. over other children, and (2.) a provision that a yearly sum of not less than 100*l.* nor more than 200*l.* should be applied in establishing bursaries tenable at the school by boys whose parents or guardians were resident in the parishes of B. and N., and who were, in the opinion of the governors, in need of assistance to enable them to continue to attend the school :—

Held, (1.) that the Board had jurisdiction under s. 28 of the Endowed Schools Act, 1869, to alter the scheme of 1877 in the manner provided by the scheme of 1907 ; (2.) that in making the scheme of 1907 the Board had had "due regard" to the educational interests of the inhabitants of B. and N. within s. 11 of the Endowed Schools Act, 1869 ; (3.) that the Board, having given public notice as required by s. 6 of the Charitable Trusts Act, 1860, of the draft scheme of 1905, had an absolute discretion to determine whether or not the modifications introduced into the scheme of 1907 were such as to render a fresh notice desirable ; and (4.) that the Board, having given to the parish councils the notice required by s. 14, sub-s. 5, of the Local Government Act, 1894, were under no obligation to give them a further notice of the modified scheme.

Semble, the directions as to notice in s. 14, sub-s. 5, of the Local Government Act, 1894, are merely directory, and in no way affect the jurisdiction of the Board to make a scheme. *In re* BERKHAMSTED GRAMMAR SCHOOL
Warrington J. 25

SCOTTISH LAW—Divorce—Foreign jurisdiction —Putative marriage — Legitimacy of issue – – – – – **344**
See MARRIAGE.

SEA—Foreshore.
See under FORESHORE.

SEASHORE—Crown lands—Grant of foreshore by the Crown — Pier — Unauthorized construction—Public nuisance – **460**
See PIER.

SERVICE—Third party notice—Leave to issue—Service on plaintiff—Ex parte application – – – – – – **224**
See PRACTICE. 2.

SETTLED LAND — *Rents — Tenant for Life and Remainderman—Will—Settlement by way of Trust for Sale—Conversion—Real Estate—Postponement of Sale—Interim Rents—Enjoyment in Specie.*

Where by a will real and personal estate are directed to be sold and converted, and the proceeds held in trust for one for life, and then for others, and without any impropriety the sale is postponed, the tenant for life of the proceeds is entitled to the rents and profits of the real estate until sale.

In re Searle, [1900] 2 Ch. 829 ; *In re Earl of Darnley*, [1907] 1 Ch. 159, followed.

Genery v. *Fitzgerald*, (1822) Jac. 468 ; *Bellairs* v. *Bellairs*, (1874) L. R. 18 Eq. 510 ; and dictum of Lord Macnaghten in *Wentworth* v. *Wentworth*, [1900] A. C. 163, 171, considered and explained. *In re* OLIVER. WILSON *v.* OLIVER – – – – **Warrington J. 74**

—— Transvaal leaseholds—Enjoyment in specie —Roman-Dutch law — English will—Life tenant and remainderman – **235**
See CONFLICT OF LAWS.

—— Way, Right of—User by public—Possibility of dedication—Acquiescence – **586**
See WAY, RIGHT OF.

—— Will—Conversion—Personalty into realty —Direction to hold proceeds of personalty upon the trusts and in manner applicable if they had arisen from a sale under the Settled Land Act, 1882
See CONVERSION. 1. **705**

SETTLEMENT—*Real Estate—Trust for Conversion—Failure of Objects of Trust—Realty or Personalty—Estate Duty.*

By a marriage settlement of 1845, real estates were conveyed by a settlor to trustees, subject to the prior life interests of his parents therein, to the use of the settlor for life, and, after his death, to the use of the trustees upon trust to sell and hold the proceeds for certain specified purposes for the benefit of the settlor's wife and children, with an ultimate trust for the settlor, his executors, administrators, and assigns. The settlor died in 1905, without having had any issue, and all the purposes for which conversion had been directed had at this date failed. By his will the settlor had devised "his interest" in these estates to his "successor Lord G. in fee" :—

Held (differing with the decision of Eve J., [1908] 1 Ch. 666, on this point) that, as the trust for sale arose only after the death of the settlor, there was at that time in the events which had happened no enforceable trust, and the question of conversion or reconversion did not arise ; but (affirming the decision of Eve J. in the result, and agreeing with him on this point) that these estates devolved as realty under the testator's will, and the estate duty payable in respect of them was properly payable by Lord G.

Attorney-General v. *Hubbuck*, (1884) 13 Q. B. D. 275, and *Clarke* v. *Franklin*, (1858) 4 K. & J. 257, distinguished. *In re* LORD GRIMTHORPE. BECKETT *v.* LORD GRIMTHORPE
C. A. 675

SETTLEMENT—*continued.*

—— Conversion—Realty or personalty. *See* under CONVERSION.

SEWERS — Construction of — Judgment for arrears of rates—Retrospective rate—Mandamus—Discretion – – **321** *See* RATES.

—— Natural stream—Pollution—Sewage works—"Deterioration of the water"—Injunction – – – – – **551** *See* LOCAL SANITARY AUTHORITY.

—— Storm-water overflow — Discharge into tidal navigable creek—Riparian owners—Trespass—Injunction – – **526** *See* LONDON.

SHIPPING — Company — Debenture stock — Covering deed—Specific ships—Specific ancillary mortgages—Substituted security—Registration – – – **564** *See* COMPANY. 5.

—— Pier. *See* under PIER.

SHOOTING—Tidal and navigable river—Right of public to shoot wild fowl—Custom—Birds of warren – – – – **139** *See* FORESHORE.

SPECIFIC DEVISE—Colonial property—Colonial death duty—Will—Direction to pay debts out of residue – – – **365** *See* WILL. 4.

SPECIFIC LEGACY—Misdescription—Shares in a bank—Absorption by another bank—Extrinsic evidence – – – **111** *See* WILL. 8.

STAMPS. *See* under REVENUE.

STATUTES:—
I.—IMPERIAL STATUTES.
II.—COLONIAL STATUTE.

I.—IMPERIAL STATUTES:—

1829.

10 Geo. 4, c. 50, s. 73—*Crown Lands* – **460** *See* PIER.

1830.

11 Geo. 4 & 1 Will. 4, c. 47, ss. 6, 8—*Debts Recovery* – – – – – **307** *See* ADMINISTRATION. 2.

1833.

3 & 4 Will. 4, c. 104—*Administration of Estates* *See* ADMINISTRATION. 2. **307**

1837.

1 Vict. c. 26, s. 24—*Wills* – – – **111** *See* WILL. 8.

1845.

8 & 9 Vict. c. 18, ss. 76, 80—*Lands Clauses* **691** *See* PRACTICE. 1.

—— —— s. 82 – – – – – **503** *See* LANDS CLAUSES ACTS.

STATUTES—*continued.*

I.—IMPERIAL STATUTES—*continued.*

1847.

10 & 11 Vict. c. 27, ss. 2, 25, 33, 47—*Harbours, Docks, and Piers Clauses* – – **460** *See* PIER.

1854.

17 & 18 Vict. c. 113—*Real Estate Charges (Locke King's Act)* – – – – **340** *See* ADMINISTRATION. 3.

1855.

18 & 19 Vict. c. 120, ss. 135, 150, 151—*Metropolis Management* – – – – **526** *See* LONDON.

1857.

20 & 21 Vict. c. 81, s. 24—*Burial* – – **600** *See* BURIAL. 2.

1858.

21 & 22 Vict. c. 104, ss. 1, 2, 23, 24, 31—*Metropolis Management Amendment* – – **526** *See* LONDON.

1860.

23 & 24 Vict. c. 136, s. 6—*Charitable Trusts* **25** *See* SCHOOLS.

1862.

25 & 26 Vict. c. 19, ss. 6, 13, 17, 19—*General Pier and Harbour Act* – – **460** *See* PIER.

25 & 26 Vict. c. 68—*Fine Arts Copyright* – **441** *See* COPYRIGHT. 2.

25 & 26 Vict. c. 89, s. 17—*Companies* – **515** *See* COMPANY. 3.

—— —— s. 41 – – – – – **86** *See* TRADE MARK. 4.

—— —— ss. 115, 161, 162 – – – **450** *See* COMPANY. 8.

1863.

26 & 27 Vict. c. 112, s. 3; s. 6, sub-ss. 1, 4; s. 32—*Telegraph* *See* TELEGRAPH. 1. **514**

1866.

29 & 30 Vict. c. 62, s. 20—*Crown Lands* – **460** *See* PIER.

1869.

32 & 33 Vict. c. 56, ss. 11, 28, 45—*Endowed Schools* – – – – – **25** *See* SCHOOLS.

32 & 33 Vict. c. 73, s. 5—*Telegraph* – – **172** *See* TELEGRAPH. 2.

32 & 33 Vict. c. 110, s. 7—*Charitable Trusts* **25** *See* SCHOOLS.

1871.

34 & 35 Vict. c. 31, s. 4, sub-s. 3 (*a*)—*Trade Union* *See* TRADE UNION. **624**

STATUTES—*continued.*

I.—IMPERIAL STATUTES—*continued.*

1872.

35 & 36 Vict. c. 65, s. 4—*Bastardy Laws Amendment*– – – – – – **687**
See AFFILIATION.

1875.

38 & 39 Vict. c. 55, s. 17—*Public Health* – **551**
See LOCAL SANITARY AUTHORITY.

—— —— ss. 28, 229, 230 – – – **321**
See RATES.

38 & 39 Vict. c. 87, s. 95—*Land Transfer*– **169**
See LAND TRANSFER.

1877.

40 & 41 Vict. c. 34—*Real Estate Charges* (*Locke King's Act*) – – – – **340**
See ADMINISTRATION. 3.

1881.

44 & 45 Vict. c. 41, ss. 19, 20—*Conveyancing and Law of Property* – – – **20**
See MORTGAGE.

1882.

45 & 46 Vict. c. 38, s. 21; s. 22, sub-s. 5; s. 24, sub-s. 3—*Settled Land* – – **705**
See CONVERSION.

45 & 46 Vict. c. 40, s. 1—*Copyright* (*Musical Compositions*) – – – – **198**
See COPYRIGHT. 1.

1886.

49 & 50 Vict. c. 33, ss. 3, 4, 6—*International Copyright* – – – – **198**
See COPYRIGHT. 1.

1888.

51 & 52 Vict. c. 17, s. 3—*Copyright* (*Musical Compositions*) – – – – **198**
See COPYRIGHT. 1.

1890.

53 & 54 Vict. c. 29—*Intestates' Estates* – **500**
See WILL. 7.

53 & 54 Vict. c. 62, s. 1, sub-ss. 4, 5 (*e*)—*Companies* (*Memorandum of Association*)
See COMPANY. 6. **287**

1891.

54 & 55 Vict. c. 39, s. 112—*Stamps* – – **515**
See COMPANY. 3.

1892.

55 & 56 Vict. c. 59, s. 5—*Telegraph* – – **514**
See TELEGRAPH. 1.

1893.

56 & 57 Vict. c. 53, s. 1—*Trustees* – – **248**
See TRUSTEE.

56 & 57 Vict. c. 73, s. 14, sub-s. 5—*Local Government* – – – – – **25**
See SCHOOLS.

STATUTES—*continued.*

I.—IMPERIAL STATUTES—*continued.*

1894.

57 & 58 Vict. c. 30, s. 8, sub-s. 13; s. 9, sub-s. 1—*Finance* – – – – – **340**
See ADMINISTRATION. 3.

1899.

62 & 63 Vict. c. 9, s. 7—*Finance* – – **515**
See COMPANY. 3.

62 & 63 Vict. c. 14, ss. 4, 23—*London Government* – – – – – **600**
See BURIAL. 2.

62 & 63 Vict. c. 33—*Board of Education* – **25**
See SCHOOLS.

1900.

63 & 64 Vict. c. 15, s. 3, sub-s. 4—*Burial* – **81**
See BURIAL. 1.

63 & 64 Vict. c. 48, ss. 4, 5—*Companies* – **228, 240**
See COMPANY. 1, 2.

—— —— s. 14 – – – – – **564**
See COMPANY. 5.

63 & 64 Vict. c. 51, s. 2, sub-s. 1 (*a*), (*b*), (*c*)—*Money-lenders* – – – – 612
See MONEY-LENDER.

1902.

2 Edw. 7, c. 41, s. 2, sub-ss. 1, 2; s. 37—*Metropolis Water* – – – – **214**
See LANDLORD AND TENANT.

1905.

5 Edw. 7, c. 15, ss. 3, 9, 25, 36, 37—*Trade Marks* **274**
See TRADE MARK. 3.

—— —— s. 8; s. 9, sub-s. 5; s. 39 – – **698**
See TRADE MARK. 2.

—— —— ss. 11, 14, 15, 20, 21 – – – **86**
See TRADE MARK. 4.

1907.

7 Edw. 7, c. 29, s. 18—*Patents and Designs* **487**
See PATENT. 3.

7 Edw. 7, c. clxxiv., s. 53—*Metropolitan Water Board* (*Various Powers*) – – **214**
See LANDLORD AND TENANT.

II.—COLONIAL STATUTE:—

Victoria, Statute of:
Victoria Administration and Probate Act, 1890 (54 Vict. No. 1060), ss. 102, 103 **365**
See WILL. 4.

STREAM—Sewage works — Natural stream — Pollution—"Deterioration of the water"—Injunction – – – – **551**
See LOCAL SANITARY AUTHORITY.

SUBSIDENCE—Mines—Overlying and underlying seams of coal—Right to support—Injunction – – – – **475**
See MINES.

SUBSTITUTION—Will—Construction **1, 117,**
See WILL. 5, 9—11. **121, n., 507**

SUPPORT—Mines—Overlying and underlying seams of coal—Right to support—Subsidence—Injunction - - - **475**
See MINES.

TAXATION—Costs.
See under COSTS.

TELEGRAPH — *Telephone — Bridge carrying Public Road over Railway—Power to lay Cable along Bridge—Consent of Railway Company—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *s.* 3; *s.* 6, *sub-ss.* 1, 4; *s.* 32—*Telegraph Act*, 1892 (55 & 56 *Vict. c.* 59), *s.* 5.

By s. 6, sub-s. 1, of the Telegraph Act, 1863, the Postmaster-General has power to place a telegraph under any public road, and by sub-s. 4 he can place a telegraph over or across a railway. By s. 32 of that Act he must not place any work over or across a railway without the consent of the directors thereof; but by the proviso to that section he is not restricted from placing any work in a public road because the road crosses a railway. But s. 32 does not say that in such a case the work shall be deemed not to be carried across a railway. Therefore a licence by the Postmaster-General which empowers a telephone company to exercise his powers of executing works other than works under, in, upon, over, along or across any railway does not authorize them to lay a cable in a public road on a bridge which crosses a railway without the consent of the railway company who are owners of and liable to repair the bridge but do not repair the road.

Decision of Warrington J., [1908] 2 Ch. 50, affirmed. SOUTH EASTERN RAILWAY COMPANY *v.* NATIONAL TELEPHONE COMPANY **C. A. 514**

2. —— *Telephone — Postmaster - General — Monopoly—Private Lines—Electric Bell Signals —Telegraph Act*, 1869 (32 & 33 *Vict. c.* 73), *s.* 5.

Private telegraph or telephone lines connecting two or more separate and independent persons or businesses, and non-telephonic fire alarms and other electric signals, fall within s. 5 of the Telegraph Act, 1869, and are therefore excepted from the monopoly of the Postmaster-General.

Decision of Swinfen Eady J., [1907] 1 Ch. 621, reversed. POSTMASTER - GENERAL *v.* NATIONAL TELEPHONE COMPANY, LIMITED **C. A. 172**

TELEPHONE.
See under TELEGRAPH.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE.
See under SETTLED LAND.

THIRD PARTY NOTICE — Leave to issue — Service on plaintiff—Ex parte application - - - - - - **224**
See PRACTICE. 2.

TITLE—Land Transfer Act—Registered title—Mortgage by deed—Contemporaneous instrument of charge — Order foreclosing mortgage, but not charge - **169**
See LAND TRANSFER.

TRADE MARK—*Passing off—Secondary Meaning of Name—"Chartreuse"—French Law of Associations—Vesting of French Business under French Judgment—Effect of Law upon Property in English Trade Marks—Rectification of Register.*

Prior to the year 1901 a body of Carthusian monks, living at the monastery of the Grande Chartreuse in France, had for many years carried on there the business of manufacturing by a secret process, and of selling, a liqueur known as "Chartreuse." In 1876 the monks, who did not carry on business in England, but whose liqueurs had acquired a great reputation here, registered in England as a trade mark a label containing the words "Liqueur fabriquée à la Grande Chartreuse," together with the device of the order and the signature of its then procureur. By a French statute, called the Law of Associations, passed in 1901, as interpreted by a French Court in 1903, the property of the monks, including their trade marks, passed to a liquidator and ultimately became vested in the defendants; but the question of the property in the English and other foreign trade marks was not decided in the judgment. The monks, having been expelled from France, set up an establishment at Tarragona, in Spain, where they manufactured the same liqueur by the same secret process, and sold it as Chartreuse through the agency of a Spanish company. The liquidator and his assignees, who were the defendants to this action, manufactured at the Grande Chartreuse, but not by the secret process, of which they were ignorant, a liqueur which they called Chartreuse, and sold it in divers countries, including England, in bottles of the old shape and bearing the old labels used by the monks. Upon application by the defendants in 1904, the comptroller placed the name of the liquidator upon the English register of trade marks in place of that of the procureur of the monks. An action was brought by the representative of the order of monks and others to restrain the liquidator and his agents from using the word "Chartreuse" in connection with the liqueur made by them, and from passing off their liqueur as that of the plaintiffs; there was also a motion to expunge the name of the liquidator's representative from the register :—

Held (reversing the judgment of Joyce J.), that the word "Chartreuse" had acquired in England the secondary meaning of a liqueur made by the monks of the Grande Chartreuse; that under the French judgments the defendants had not acquired the right of selling their own liqueur in England under the original labels and marks; that the English trade marks had not passed to the liquidator and through him to the defendants; that the defendants were passing off their own liqueur under the name "Chartreuse" as being the original liqueur made by the monks, and that the plaintiffs were entitled to an injunction to restrain the defendants from using the word "Chartreuse" in England in connection with the sale of liqueur other than that made by the plaintiffs as the name of or as descriptive of the liqueur or without clearly distinguishing their own liqueur from that of the plaintiffs.

Held, also, that the name of the liquidator's

TRADE MARK—*continued.*

representative must be expunged from the register of trade marks. REY *v.* LECOUTURIER
C. A. 715

2. —— *Registration — Distinctive Mark — Registrable Trade Mark —Adapted to distinguish — Confusion with other Goods — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 8 ; *s.* 9, *sub-s.* 5 ; *s.* 39—*Trade Marks Rules*, 1906, *r.* 39.

Application under s. 9, sub-s. 5, of the Trade Marks Act, 1905, for the registration of the word "Oswego" alone in class 42 in respect of corn flour. The applicants were an American company with factories at Oswego, in New York State. There was evidence to shew that they had sold Oswego corn flour for many years in this country, that there was no other corn flour known by the name "Oswego," that their corn flour was known to the public as "Oswego" without the use of their name, and that the name "Oswego" was known in this country through its association with their goods rather than as a geographical name.

There were on the register five other trade marks in class 42 containing the word "Oswego." Three of these belonged to the applicants and two to biscuit manufacturers who did not oppose the present application :—

Held, that the only question now before the Court was whether "Oswego" was adapted to distinguish the corn flour of the applicants from the corn flour of other persons ; that the Court had not to consider whether registration of "Oswego" might lead to confusion between the applicants' corn flour and similar goods, such as oatmeal, of other persons ; that the Court had power to take into consideration evidence of actual user of the trade mark ; and that on the evidence in the present case there must be a declaration that "Oswego" ought to be deemed a distinctive mark in respect of corn flour. *In re* NATIONAL STARCH COMPANY'S APPLICATION FOR THE REGISTRATION OF A TRADE MARK
Warrington J. 698

3. —— *Registration—Invented Word—Reference to Character and Quality of Goods—Descriptive Name — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9, 35, 36, 37.

In May, 1905, P. registered, as a trade mark, under the Patents, Designs and Trade Marks Acts, 1883 to 1888, the word "Diabolo" in respect of tops. The word was not then a word current in the English language, but was to be found in some Italian dictionaries as a variant for "diavolo." The top in respect of which the mark was registered and used was a double-coned one which was adapted to be rotated by a cord attached to two flexible rods, the top and the rotatory apparatus forming the means of playing a game which with some improvements was a revival of a game played about the beginning of the nineteenth century, in France called "le diable" or "le jeu au diable" and in England "the devil on two sticks" :—

Held, that as the word "Diabolo" was such as to suggest to ordinary minds (and selected so to suggest) the devil or something in which the devil played a part, it was not an invented word

TRADE MARK—*continued.*

or a word having no reference to the quality or character of the goods, and was not a registrable trade mark and must be removed from the register of trade marks.

Observations as to the meaning of s. 36 (removal of marks already on the register at the commencement of the Trade Marks Act, 1905) and s. 37 (as to removal of marks for want of bona fide intention of user in connection with goods).

Quære, whether the word was not also open to objection because it was not at the date of registration used or proposed to be used to indicate that the goods to which it applied were the goods of the person asking for registration. PHILIPPART *v.* WILLIAM WHITELEY, LIMITED. *In re* PHILIPPART'S TRADE MARK "DIABOLO"
Parker J. 274

4. —— *Registration — Same Goods or Description of Goods — Nearly identical Trade Marks—"A. B. C."—Matter common to Trade—Honest concurrent User—Matter calculated to deceive — Disclaimer — Discretion of Court — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 14, 15, 20, 21—*Limited Company's Trade Mark —Name or Signature—Advertisements—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 41.

In 1906 the Aerated Bread Company applied to register as a trade mark in class 45, in respect of cigars, cigarettes, and tobacco, a device which was a reproduction of the company's common seal having the letters A. B. C. in the centre, and which was already registered as their trade mark in class 42 in respect of bread, biscuits, cakes, and flour. Shortly afterwards A. Baker & Co., who carried on business as tobacconists, applied to register a series of four labels as trade marks in class 45 in respect of cigarettes. One of the distinguishing features in the series was a circular band or garter in the centre of which appeared the letters A. B. C. and round the edge of which were contained the words "A. Baker & Co. Ld." A. Baker & Co. had for the last eleven years used the mark they sought to register and with perfect good faith claimed the right to the exclusive user of the letters "A. B. C." The Aerated Bread Company opposed A. Baker & Co.'s application on the ground that there had been concurrent user of the letters A. B. C. by themselves and others, and that A. Baker & Co.'s labels should only be registered on a disclaimer by them of any right to the exclusive use of that part of the label. A. Baker & Co. opposed the Aerated Bread Company's application on the ground that their mark contained matter the use of which would, by reason of its being calculated to deceive, be disentitled to protection in a Court of justice. The registrar refused to register either mark, and thereupon each company applied to the Court for a direction to the registrar to proceed with the registration of their respective marks. At the hearing A. Baker & Co. failed to establish that the letters A. B. C. exclusively indicated their goods. The evidence also shewed that in the past the concurrent user of the letters A. B. C. for the same goods by the Aerated Bread Company, A. Baker & Co., and

TRADE MARK—*continued.*

others had not led to any mistake, confusion, or complaint.

On A. Baker & Co.'s application :—

Held, that in the circumstances the Court, in the exercise of its discretion under s. 15 of the Trade Marks Act, 1905, would not impose upon the applicants a condition requiring them to disclaim any part of their combination although containing matter common to the trade, and that they were entitled to have their trade marks registered.

The condition of disclaimer is one for the imposition of which some good reason ought to be established rather than one which ought to be imposed unless some good reason to the contrary is made out.

The failure of a claim to a monopoly, put forward and asserted with good faith, does not necessarily involve the imposition of a disclaimer as a condition of registration.

Held, also, that the applicants' trade marks were not "advertisements" within the meaning of s. 41 of the Companies Act, 1862, necessitating the mention thereon of the applicant company's name in legible characters ; and that there is nothing in the Trade Marks Act, 1905, confining the name or signature appearing in a trade mark to the name or signature of the applicant.

On the Aerated Bread Company's application :—

Held, that the applicants had discharged the burden which lay upon them of shewing that their trade mark was not calculated to deceive, and that they were entitled to have their mark registered in class 45. *In re* ALBERT BAKER & CO.'S APPLICATION. *In re* AERATED BREAD COMPANY'S APPLICATION – – **Eve J. 86**

TRADE MARKS RULES, 1906, r. 39 – 698
See TRADE MARK. 2.

TRADE UNION—*Title to sue—Branch—Secession—Resolution for Distribution of Funds—Ultra vires—No Order for Payment—"Directly enforcing Agreement" — Jurisdiction — Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-s.* 3 (*a*).

A resolution was passed by the members of a branch of a registered trade union society that they would secede from the parent society and distribute the funds amongst the members of the branch. The trustees of the branch having declined to pay over the funds under their control to the head trustees, when required so to do, according to the rules of the society, the head trustees brought an action against the trustees of the branch asking for a declaration that the resolution was ultra vires, and also for an order for the payment to them of the funds of the branch :—

Held, following the decision in *Yorkshire Miners' Association* v. *Howden*, [1905] A. C. 256, that the society had a sufficient interest, under the rules, in the property of the branch to maintain the action, notwithstanding the provisions of s. 4 of the Trade Union Act, 1871, and that the proposed distribution was ultra vires and not in accordance with the rules of the society.

TRADE UNION—*continued.*

But *held*, that the Court would not make any order for payment to the head trustees, as that would be administering the funds of the society. COPE *v.* CROSSINGHAM – – – **Eve J. 624**

TRANSFER—Land Transfer.
See under LAND TRANSFER.

TRANSVAAL LEASEHOLDS — English will — Enjoyment in specie — Roman-Dutch law – – – – – – **235**
See CONFLICT OF LAWS.

TRESPASS — Sewers — Storm-water overflow — Discharge into tidal navigable creek— Injunction – – – – **526**
See LONDON.

TRUST—Conversion, Trust for.
See under CONVERSION.

TRUSTEE — *Investment expressly forbidden — Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 1.

A direction to keep trust funds and invest them in one particular way does not "expressly forbid" investment in any of the investments authorized by the Trustee Act, 1893. *In re* BURKE. BURKE *v.* BURKE – **Neville J. 248**

ULTRA VIRES—Railway company — Compulsory powers—Powers exercisable for limited period — Expiration of time allowed—Power to construct railway
See RAILWAY. **644**

—— Trade Union—Resolution for distribution of funds—No order for payment– **624**
See TRADE UNION.

VENDOR AND PURCHASER—*Restrictive Covenants—Building Scheme—Rights of Purchasers inter se — Covenant to observe Covenants in General Deed — General Deed not executed—Reservation to Vendor of Right to dispense with Restrictions.*

A building society purchased the F. estate in 1860. A sale plan was then prepared, on which the estate was plotted out into lots, and the conditions which were to affect the different lots were printed. Among these were conditions that each purchaser should execute a deed of covenant for regulating building on his lot and securing performance of the conditions therein contained ; and that no hotel should be built on any lot and no building used as such without the vendor's consent. At the end was a proviso that the vendors should have power to deal with any part of the estate not disposed of without reference to the restrictions. In January, 1861, the estate was conveyed to trustees for the building society.

A deed was then prepared, purporting to be made between the purchasers whose names were set out in the second schedule of the first part and the trustees of the second part. It contained covenants by the purchasers with each other and the trustees to observe the restrictions contained in the first schedule. These restrictions were the same as those on the sale plan. This

VENDOR AND PURCHASER—*continued.*

document was engrossed, dated January 16, 1861, and stamped, but it was never executed either by the trustees or any purchaser. A printed form of conveyance was prepared for the society which contained a covenant by the purchaser to observe and perform the restrictions and covenants contained in an indenture dated January 16, 1861, and expressed to be made between the persons whose names were subscribed in the second schedule of the first part and the vendors of the second part. The defendants were owners of two lots conveyed to their predecessors in title by deeds in the printed form on December 27, 1861, and April 19, 1866, on which they had recently erected a building which they were using as an hotel. The plaintiffs were the owners of three plots conveyed to their predecessor in title on December 27, 1861, and brought this action to restrain the defendants from carrying on the hotel. The several conveyances under which the plaintiffs and defendants claimed were executed by the vendors only, not by the purchasers:—

Held (affirming the decision of Parker J., [1908] 2 Ch. 374) that, notwithstanding the reservation of a dispensing power to the vendors and the non-execution of the deed of covenant, there was a general building scheme for the benefit of the purchasers inter se as well as of the vendors, and that the covenants could be enforced at the suit of the plaintiffs.

Parker J.'s statement of the requisites for enforcing restrictive covenants as between different purchasers approved.

Osborne v. *Bradley*, [1903] 2 Ch. 446, distinguished. ELLISTON *v.* REACHER – **C. A. 665**

——Alienation by "devisee" — Mortgage of equitable estate—Purchaser for value without notice—Priority – – **307**
See ADMINISTRATION. 2.

——Costs — Taxation — Sale of leaseholds — Death of vendor before completion—Vendor's will—Costs of probate – **503**
See LANDS CLAUSES ACTS.

VICTORIA—Will – Direction to pay debts out of residue — Colonial death duty — Victoria Administration and Probate Act, 1890 – – – – – **365**
See WILL. 4.

WAIVER — Money-lender — Registration — Mortgage in unregistered name — Invalidity—Waiver of illegality – **526**
See LONDON.

WARREN — Foreshore — Tidal and navigable river—Wild fowl—Custom—Birds of warren – – – – – **139**
See FORESHORE.

WATER — London — Main drainage system — Sewers — Storm-water overflow — Discharge into tidal navigable creek **526**
See LONDON.

—— Stream.
See under STREAM.

WATERWORKS COMPANY—Covenant not to assign without consent—Power of re-entry on breach—Alienation—Statutory powers – – – – **214**
See LANDLORD AND TENANT.

WAY, RIGHT OF—*Highway—User by Public—Dedication—Land in Settlement—Possibility of Dedication—Tenancy for Life with Remainder in Fee—Presumption—Acquiescence.*

Where land is in settlement and limited to a tenant for life with remainder to a tenant in fee, both of whom are sui juris, and no other persons are interested, it is possible for the tenant for life and remainderman together to dedicate to the public a road over the land; therefore where land was thus settled and was under the control and management of the remainderman, and a road over it was laid out by him and was used by the public in such a way as would have compelled the Court as against an owner in fee to infer dedication, and the remainderman, after the death of the tenant for life and after a further settlement, acquiesced in this user, the Court drew the inference that the road had been dedicated to the public by the tenant for life and remainderman. FARQUHAR *v.* NEWBURY RURAL DISTRICT COUNCIL – **Warrington J. 586**

WILL—*Charge of Debts and Legacies—Implied Power to sell or mortgage—Beneficial Devise in Fee to One Executor—Mortgage by Devisee to raise Legacies—Liability of Mortgagee to see to Application of Money.*

A beneficial devise of land in fee to a devisee who is also an executor, subject to a general charge of debts and legacies, empowers that executor-devisee to sell or mortgage the land and to give a good receipt to the purchaser or mortgagee, who is not bound to see to the application of the purchase or mortgage money even if it is expressed to be raised for the payment of legacies only.

Johnson v. *Kennett*, (1835) 3 My. & K. 624, 630; *Forbes* v. *Peacock*, (1846) 1 Ph. 717, 721; *Stroughill* v. *Anstey*, (1852) 1 D. M. & G. 635, 653; and *Corser* v. *Cartwright*, (1875) L. R. 7 H. L. 731, 736, applied.

In re Rebbeck, [1894] W. N. 68; 42 W. R. 473, distinguished.

It is not necessary that the executor-devisee should expressly purport to execute the conveyance or mortgage in his capacity of executor.

In re Venn and Furze's Contract, [1894] 2 Ch. 101, 114, applied. *In re* HENSON. CHESTER *v.* HENSON – – – **Swinfen Eady J. 356**

2. —— *Contingent Remainder or Executory Devise—Construction of Will.*

A testator who died in 1847 devised real estate to B. for life and after his death to his sons successively in tail male, and in default of such issue to the eldest or other son of J. S. who should first attain or have attained the age of twenty-one years successively in tail male, and in default of such issue to F. S., the daughter of J. S., for life, and after her death to her first and other sons successively in tail male.

B. died in 1859. At that date no son of J. S. had attained twenty-one. J. S. entered into possession as guardian of his infant son, who

WILL—*continued.*

entered into possession on attaining twenty-one, and was on his death in 1879 succeeded by his son, who retained possession until the commencement of this action. F. S. lived until March 1, 1906, and on her death her eldest surviving son brought this action claiming the estate :—

Held, that the limitation to the first son of J. S. who attained twenty-one was a contingent remainder, and failed because no such son had attained twenty-one before the determination of the particular estate which supported the remainder, and that the words "in default of such issue" were merely equivalent to "in remainder," and did not make the limitations subsequent to the devise to the sons of J. S. contingent upon J. S. having no sons who attained twenty-one. The plaintiff, therefore, was entitled to the estate.

The question whether a devise is to be construed as a contingent remainder or an executory devise is one of strict law and cannot be affected by the intention of the testator unless his words can be construed as expressing an intention to make alternative gifts, one as a contingent remainder and the other by way of executory devise.

In re Wrightson, [1904] 2 Ch. 95, explained. WHITE *v.* SUMMERS – – **Parker J. 256**

3. —— *"Debentures"—Bequest of "all my Debentures" in a Company—Testator holding Debentures and Debenture Stock—Construction.*

Testator, by his will dated in 1904, bequeathed "all my debentures and preferred and deferred stock in the Municipal Trust Company, Limited." The testator was the chairman of the company, and at the date of his will and at the time of his death in 1906 he possessed, in addition to debentures and preferred and deferred stock, a considerable amount of debenture stock :—

Held, that the debenture stock passed under the bequest. *In re* HERRING. MURRAY *v.* HERRING – – – – **Joyce J. 493**

4. —— *Direction to pay Debts out of Residue —Specific Devise of Colonial Property—Colonial Death Duty—"Deemed to be a Debt"—Incidence of Duty — Victoria Administration and Probate Act*, 1890 (54 *Vict. No.* 1060), *ss.* 102, 103.

A testatrix domiciled in England made an English will appointing English executors and trustees and Colonial executors and trustees.

She devised certain land in Melbourne, Victoria, to her Colonial trustees upon trust to sell the same and to pay or remit the proceeds of sale to her English trustees to be held upon certain specific trusts.

She devised and bequeathed the residue of her real and personal estate to her English trustees upon trust to sell and convert the same into money and thereout to pay (inter alia) her "debts" and to stand possessed of the residue thereof upon certain residuary trusts :—

Held, on the construction of the will, that (*a*) the direction to pay debts out of residue referred to actual debts and did not include local death duty on the Melbourne property, though "deemed to be a debt of the testatrix" by the local law ; (*b*) the local death duty and other expenses of realizing the Melbourne property fell on that property and not on residue.

Peter v. *Stirling*, (1878) 10 Ch. D. 279, and *In re Maurice*, (1896) 75 L. T. 415, distinguished. *In re* BREWSTER. BUTLER *v.* SOUTHAM **Swinfen Eady J. 365**

5. —— *Forfeiture Clause—Legacy—Codicil — Substituted Settled Legacy — Will — Construction.*

Decision of Eve J., [1908] 1 Ch. 599, reversed on the construction of this particular will and codicil. *In re* JOSEPH. PAIN *v.* JOSEPH **C. A. 507**

6. —— *Inaccurate Enumeration — Gift of Residue to A., B., and "the six Children now living" of C.—All but one of C.'s Children dead at Date of Will—Mistake—Rejection of Specified Number—Residue divisible amongst A., B., and surviving Child—Class—Construction of Will.*

Where, on construction, the Court finds a dominant intention by the testator to benefit persons who answer a particular description or class, coupled with a mistake in the enumeration of the persons answering the description or composing the class, the Court will reject the inaccurate enumeration, whether the actual number in existence at the date of the death is less or more than that specified in the will.

Principle of *Garvey* v. *Hibbert*, (1812) 19 Ves. 125, applied to the case where the number of children was less than that specified in the will.

Decision of Joyce J., [1908] 1 Ch. 372, affirmed. *In re* SHARP. MADDISON *v.* GILL **C. A. 190**

7. —— *Lapse—Death of all Beneficiaries and Executor before Testator—Administration cum testamento annexo—"Intestate"—Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29).

Where there was a complete failure by lapse of all the beneficial interests under a will, and the person named as executor had predeceased the testator, who died leaving a widow, but no issue :—

Held, that the testator had died "intestate" within the meaning of the Intestates' Estates Act, 1890, and that his widow was entitled to 500*l.* out of his estate absolutely and exclusively. *In re* CUFFE. FOOKS *v.* CUFFE **Joyce J. 500**

8. —— *Specific Legacy — Misdescription — Shares in a Bank—Absorption by another Bank — Extrinsic Evidence — Admissibility — Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

By her will, made in 1902, a testatrix bequeathed to two legatees equally "all my shares in the Wensleydale and Swaledale Banking Company." There was no bank of that name in existence at the date of the will, or at the death of the testatrix in 1906, but for some years prior to 1899 the testatrix had been the possessor of twenty-five shares in the Swaledale and Wensleydale Banking Company, Limited. The undertaking of this bank was amalgamated with Barclay & Co., Limited, as from July 1,

WILL—*continued.*

1899, and the testatrix received twenty-five shares in Barclay & Co., Limited, in exchange for her shares in the absorbed bank. At the date of her death the testatrix still held the twenty-five shares in Barclay & Co., Limited, and had no other bank shares. Evidence was admitted shewing the dealings of the testatrix with the shares, and her knowledge of the amalgamation :—

Held, that the twenty-five shares in Barclay & Co., Limited, passed to the specific legatees, and did not fall into the residue. *In re* JAMESON. KING *v.* WINN - - - - **Eve J. 111**

9. —— *Substitutionary Gift — Words of Futurity—Child dead at Date of Will leaving Issue—Will—Construction.*

A testator gave his residuary estate in trust (subject to a life estate for the benefit of his wife, who predeceased him) for all his children who attained the age of twenty-one years in equal shares, "Provided always that if any child of mine shall die in my lifetime leaving a child or children who shall survive and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent or parents had survived me subject nevertheless to the proviso hereinafter contained Provided always that if any child of mine shall die in the lifetime of my said wife leaving a husband or wife who shall survive her then I declare that on the decease of my said wife the income of the share of any deceased child of mine shall go and be payable to such husband or wife of such deceased child of mine" :—

Held, that the residuary gift did not include the children of a child dead at the date of the will or the husband or wife of any such last-mentioned child. *In re* COPE. CROSS *v.* CROSS **C. A. 1**

10. —— *Words of Futurity—Gift to Nephews and Nieces—Gift to Children of Nephew in case any Nephew "shall die in my lifetime"—Nephew dead at Date of Will leaving Child—Will—Construction.*

Testatrix by her will gave the residue of her estate "in trust for all my nephews and nieces who shall be living at my death to be equally divided between them. Provided always that if any nephew or niece of mine shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such persons had survived me" : —

Held, that the child, who attained twenty-one and survived the testatrix, of a nephew

WILL—*continued.*

already dead at the date of the will was entitled to share in the residue.

Loring v. *Thomas*, (1861) 1 Dr. & Sm. 497, and *Barraclough* v. *Cooper*, [1908] 2 Ch. 121, note, followed.

Gorringe v. *Mahlstedt*, [1907] A. C. 225, distinguished. *In re* LAMBERT. CORNS *v.* HARRISON - - - - - - **Eve J. 117**

11. —— *Words of Futurity — Residue — "Shall die in my Lifetime"—Class—Substitutional Gift—Construction of Will.*

The trustees of the will took out an originating summons for the determination (inter alia) of the question whether at the death of his widow the testator's residuary real and personal estate (subject as to the specifically mentioned portions of his real estate to the trusts concerning the same in the will declared) became divisible in equal fourth shares between the defendants, his four children, or in equal fifth shares between the said defendants and the defendant Mary A. U. C. Cooper :—

Held, that this case cannot substantially be distinguished from and is governed by *Loring* v. *Thomas*, (1861) 1 Dr. & Sm. 497, a decision of Kindersley, V.-C., and one now of established and undoubted authority. In each case the original gift in the will in question is to a class of persons to be ascertained at the death of the testator, while the subsequent provision in favour of issue is not properly speaking a substitutional gift, but makes an addition to the class of persons taking under the original gift by reference to the issue of certain hypothetical persons. BARRACLOUGH *v.* COOPER, H. L. (E.), Feb. 20, 1905 - - - [1908] **2 Ch. 121, n.**

—— Administration.
See under ADMINISTRATION.

—— Conversion.
See under CONVERSION.

—— English will—Transvaal leaseholds—Enjoyment in specie—Roman-Dutch law
See CONFLICT OF LAWS. **235**

—— Power of appointment.
See under POWER OF APPOINTMENT.

—— Probate.
See under PROBATE.

—— Settled estate—Conversion—Postponement of sale—Interim rents - - **74**
See SETTLED LAND.

WINDING-UP—Company.
See under COMPANY.

WORDS—"Chartreuse" - - - - **715**
See TRADE MARK. 1.

—— "Debentures" - - - - **493**
See WILL. 3.

WORDS—*continued.*

—— "Debts" – – – – – 365
See WILL. 4.

—— "Devisee" – – – – – 307
See ADMINISTRATION. 2.

—— "Equitable charge" – – – 340
See ADMINISTRATION. 3.

—— "Intestate" – – – – – 500
See WILL. 7.

WORDS—*continued.*

—— "Mooring" – – – – – 460
See PIER.

—— "Oswego" – – – – – 698
See TRADE MARK. 2.

—— "Seised," dying – – – – 13
See HERIOT.

—— "Shall die" – – – 1, 117, 121, n.
See WILL. 9—11.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

BIBL. LONDIN UNIV.